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SLY
COTTON



ON THE
ADMINISTRATION
OF
CRIMINAL JUSTICE
IN
ENGLAND;
AND THE
SPIRIT OF THE ENGLISH GOVERNMENT.

BY
M. COTTU,
COUNSELLOR OF THE ROYAL COURT OF PARIS, SECRETARY
GENERAL OF THE GENERAL COUNCIL OF THE ROYAL
SOCIETY OF PRISONS, AND OF THE SPECIAL
COUNCIL OF THE PRISONS OF PARIS.

TRANSLATED FROM THE FRENCH.

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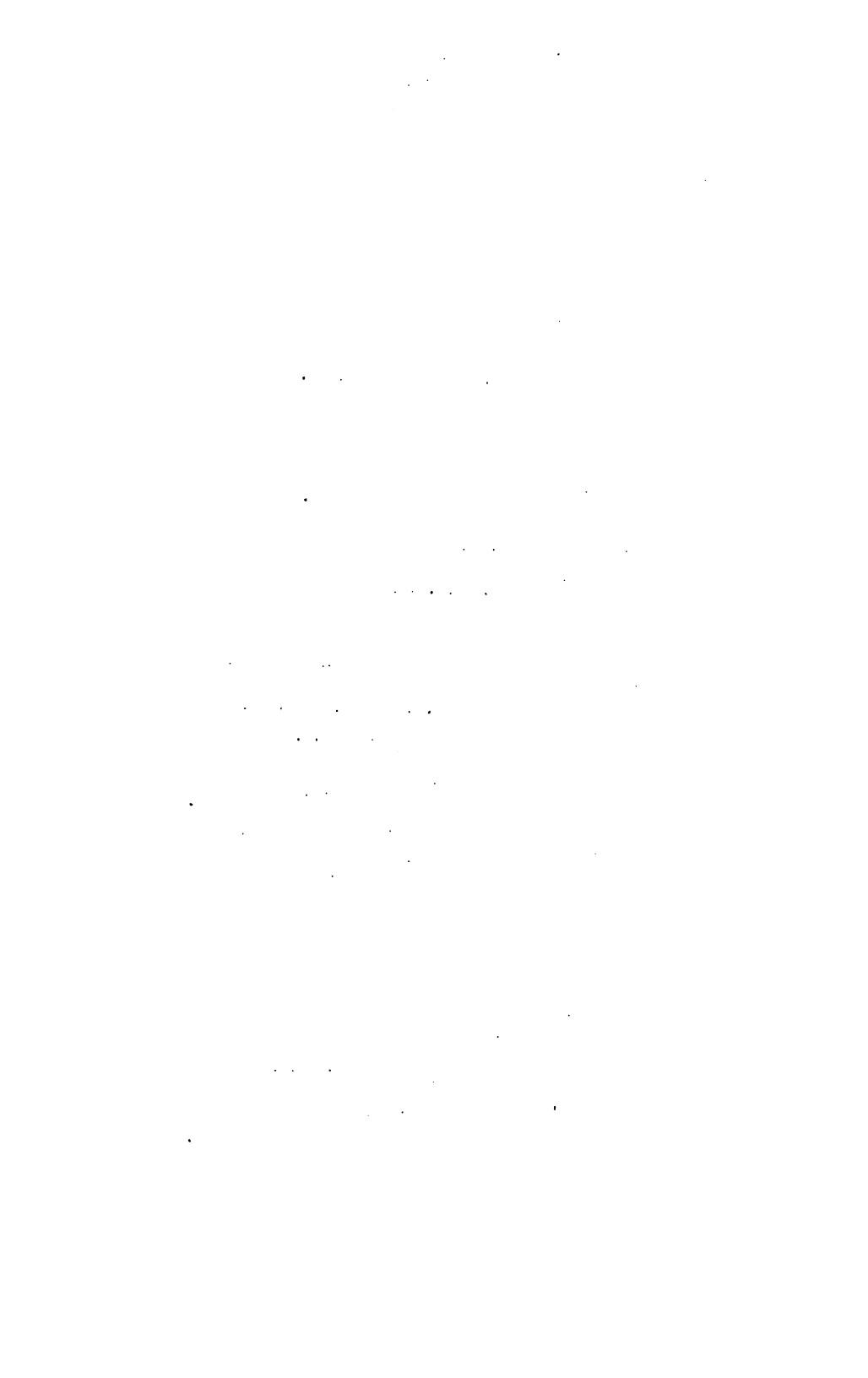
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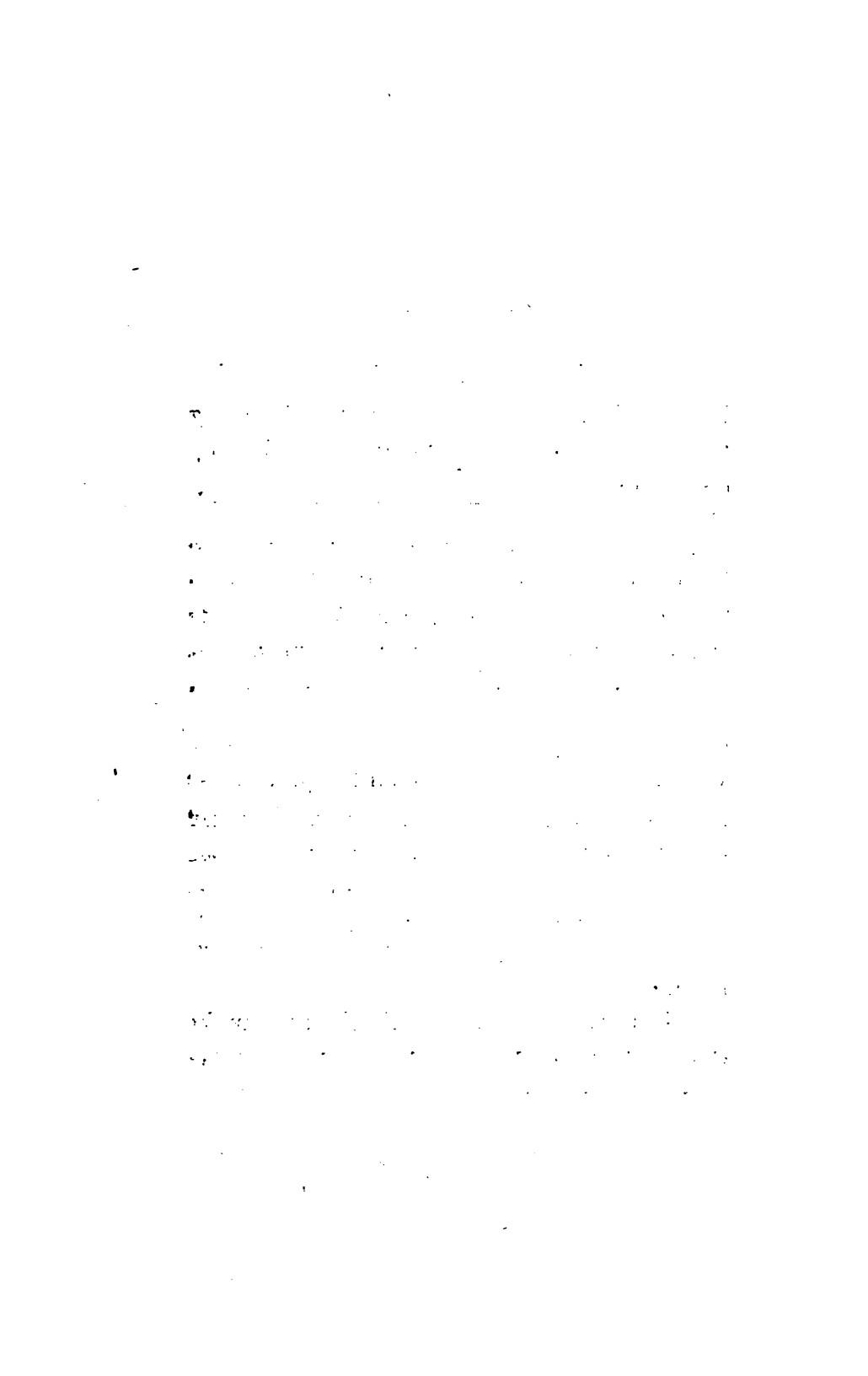
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ADVERTISEMENT.

No translation of M. Cottu's Work having been made in a regular shape, the following is an attempt to supply the desideratum. The subjects treated are those the most interesting to an Englishman,—the laws relating to life, and the constitution of his country. The great celebrity of the original prevents the necessity of any reflexions. It is one continued panegyric upon our political and social institutions, accompanied throughout with admiration and regret on the part of the Author,—admiration of their beauty, order, and peculiar aptitude to make a nation happy; regret that his own country should be so deficient in the elements of sound and efficient polity.

It has been the Translator's object to make the subjects read smoothly on, by avoiding such technicalities as might embarrass the general reader.



PREFACE.

SENT to England by the government to study the mechanism and operation of the trial by jury, I now offer to the public the result of my investigations. The English trial by jury, as may be seen by the perusal of the following pages, is so intimately connected with every other political institution, that it appeared to me impossible to have a full idea of it, without some previous acquaintance with the general spirit of the English constitution. To obtain this, my first object was to form a connection with persons the best informed on the laws of their country; and then it was I felt the peculiar value of the letters of introduction which I had received to the Marquis of Lansdown. That illustrious nobleman, whose house presents a point of union for the most distinguished personages, had the kindness to introduce me to Mr. Scarlett, one of the most eminent counsel of the northern circuit, now a member of parliament, and marked out, by his great talents, as the future successor of his illustrious friend, Sir Samuel Romilly. Mr. Scarlett persuaded

me to accompany him on his circuit, as the most certain means of becoming acquainted with all the particulars I was desirous of knowing; promising to aid me by his advice, and explain any difficulties that might be encountered in my researches. The English government, too, had the goodness to recommend me to the two judges, Wood and Bailey, who were to hold the assizes of the northern circuit; and these gentlemen, in addition to their private attentions, gave the requisite orders to furnish me with all the documents I might wish to consult. The counsel of the circuit likewise kindly offered to give me any explanation that might be required. Lastly, Mr. Scarlett's son had the great condescension to act as my interpreter, accompanying me to the undersheriff to inspect the jury books, and visiting with me the various prisons that lay in my road.

The present work is, therefore, less the offspring of my own reflexions, than a collection of opinions received from persons the best informed on the subjects here treated. I have done every thing to obtain a right meaning of their words; I laid before them, separately, the same points on which I had any doubt; and I never failed to have every difficulty cleared on which their opinions differed. When my work was completed, I submitted

it to Mr. Grey,* a young barrister of the greatest promise, and afterwards to Mr. Scarlett, who kindly snatched a moment from his numerous avocations to point out such errors as had escaped me, and even to furnish me with some notes on the spirit of the English constitution.

I therefore offer this work to the public with the confidence of having neglected nothing that depended on myself, to render it worthy of their attention; and I think I may assert, that, in default of any other merit, it will be found to possess the greatest correctness. I can moreover say, with the most conscientious sincerity, that I think I have not flattered the English; and if I have shown for their character and institutions an esteem which will perhaps appear extravagant, in our present state of prejudiced feeling against them, that esteem is the result of my intimate conviction, that that people have raised higher than any other the science of genuine liberty, and the civil virtues requisite for its maintenance. In the comparison which I was called upon to make between their criminal system and our own, it was my duty to tell the truth, such as

* Now Sir Charles Grey, and appointed a Judge at the Court of Madras.

it appeared to me, without inquiring whether it was of a nature to strengthen or weaken the high opinion which so many other advantages justly give us of the greatness of our own nation. I can never think, that flattery, considered so mean a vice with respect to an individual, can be such with respect to his country.

I thought further, that it might not be unprofitable to give a slight sketch of the public and private manners of the English nation, because we can never be really acquainted with a people's laws whilst ignorant of the spirit in which they are executed. That too which renders the manners of the English the most worthy of praise, being derived from the influence of their constitution, rather than the effect of climate, it occurred to me that such a picture might peculiarly interest us. It will show what, by the daily action of our new institutions, our present manners will infallibly one day become; or, if those institutions are doomed to experience insuperable obstacles in our old prepossessions, it will exhibit the new manners which, by a bold effort over ourselves, we ought to adopt, in order to preserve our liberties.

The work concludes by a rapid exposition of the improvements which appeared to me susceptible of being grafted on our criminal

laws. I have pointed out, without reserve, all existing abuses, heedless of the clamour and perhaps animosity, I might excite against me. It was my wish that, at the moment when the attention of the Chambers was about to be called to the revision of our criminal procedure, they should know its real state. I was not unaware that, if my work might, in some respects, appear worthy of public interest, it would probably become an object of censure to all parties. Some will see in it a design to prepare the public mind for the yoke of a new aristocracy; by others, on the contrary, it would be considered written with the view of stirring up the people to demand fresh securities from the crown; but I shall console myself with the reflexion that I have performed the part of a good member of community; and that perhaps the example of a nation so long subjected to a criminal system full of gentleness and mercy, may have some influence on our old and barbarous practice; that it may soften our harshness, and induce us to make the alterations so imperiously demanded by the honour of our national character. If I am misled in the expectation of the advantages to be found in the adoption of some parts of the English process, my error springs from good faith, and not from any sort of infatuation for

foreign institutions. But the prompt operation of those institutions, compared with the lumbering action of ours, has produced so forcible an impression on my mind, that I could not refrain from ardently wishing that we might in part appropriate them, in order that our criminal process might in its turn become to foreigners an object of envy and emulation.



ON THE
ADMINISTRATION
OF
CRIMINAL JUSTICE
IN ENGLAND.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

To be able to form a correct idea of the criminal procedure established in England, it is necessary to have some previous acquaintance with certain civil and political institutions which exercise a considerable influence over many parts of this procedure.

Property is not equally divided in England, as in France, among all the children of the same family. Nearly all the great estates are entailed; and in every class of society, from the nobleman down to the meanest citizen, the law of inheritance has given to the eldest the whole of the real estate, leaving only the personal property to be divided among the rest of the children. It is true, also, that it gives parents the unlimited disposal of the whole of

their property, according as they may judge proper. But it is extremely rare that they avail themselves of this liberty to apportion it equally; and although it be difficult to assign precisely what may be the share of the younger children, since that depends on the caprice or private feelings of the testator, it may yet be affirmed that it always greatly inferior to that of the elder.

Thus the customs of the nation, far from being in opposition to the law, are, on the contrary, in conformity with its spirit; and in every family, the principle of the inequality of partition, and of almost the whole of the real estate devolving to the eldest son, is irrevocably established.

This law and these customs are productive of great results.

The most important of all is to attach each family, not only to the estate, but even to the county in which it is situated; and this attachment becomes a feeling so powerful, and, as it were, so sacred, that there is to be found a great number of estates that have continued in the same family from the time of the conquest. All take a pleasure in ornamenting and improving possessions which they know will pass to their remotest posterity: the consequence of which is that no country in the world pre-

sents a more delightful picture than the country parts of England. They are all studded with parks kept in the most perfect order, and enlivened by the motions and gambols of a multitude of domestic animals that graze about in freedom. Every land-owner takes as much pride in his garden as in his house, and would feel ashamed of showing it to a stranger in a state of slovenliness or neglect. The master's eye has always the same vigilance, because the master never grows old. When age begins to render him indifferent to the enjoyments of this world; when the earth in vain presents to him her seductive charms, and he attaches importance to that only which pertains to eternity, he is replaced by his eldest son, whom youth still connects with things here below, and who, being set apart as the next possessor of the family estate, displays in the management of it a watchfulness the more active in proportion to his father's rapid approach to the close of his career.

Yet it is not merely to this order of inheritance that we should attribute the practice of the English of passing the greater part of the year upon their estates, since in the provinces of France, where the same order of succession was formerly established, land-holders were nevertheless in the habit of shutting themselves

up in towns, and of fixing there the principal place for transacting their affairs. This custom is likewise the result of all their municipal institutions, which, as I am about to show, bestow on the chief personage of each county, not merely the almost entire administration of the province, but moreover the settling, division and employment of a great part of the rates ; the maintenance of public tranquillity ; and the distribution of justice.

It is the prospect of these municipal dignities which, with the effect of the system of inheritance just explained, keeps each land-holder on his property, inducing him to prefer his abode there, enlivened and filled with a thousand various interests, to that which he might pass in town, where it would be consumed in insipid pleasures and frivolous occupations.

Thus the great and important class of land-owners, far from being pent up in a few confined spots, is found almost uniformly spread over the whole face of the empire, contributing to the dissemination, even in the most remote places, of instruction and good manners, together with the agreeable and useful inventions that may be acquired during winter in the capital. This primary effect of the influence of men of property upon the great body of the people is strikingly remarkable to a foreigner.

In travelling through England he is surprized at the absence of that provincial air so conspicuous every where else. From one end of the kingdom to the other, he finds nearly the same dress, the same habits, the same cleanliness, the same carriages, and almost the same language. The nation does not appear to be a collection of different nations, vainly united under the same government, yet still separated by their ancient manners and customs. The whole English people seem to form but one single people, submitting to the same laws, animated by the same institutions, proud of the same rights, linked together by the same interests, the same desires, and, if you please, by the same prejudices.

Their occupations on their estates are in conformity with the object they have in view, or with that which they have already attained, namely, the acquirement in the county of some of those administrative employments, set apart for the most distinguished land-holders, as, for instance, that of grand jurors. This desire induces them to attract public attention and regard by every possible means; by exemplary conduct in their domestic affairs, exactness in fulfilling their duties as members of the community, by universal kindness to their inferiors, and by great agricultural under-

takings. They impose on themselves the obligation of contributing, as far as they can, to the splendour of county festivals, to certain customary concerts, to horse-races, and the balls given at the period of the assizes. They regard these recreations as family festivities ; they hasten to subscribe towards defraying their expenses, and they appear at them in their most elegant equipages, accompanied by their wives and daughters. Lastly, they take part in the political meetings of the county, and endeavour to distinguish themselves, if not as orators, at least as persons versed in the knowledge of the laws, and the true interests of their country.

The life which they pass in the country is not of that monotonous kind attached almost always to limited situations ; on the contrary, their eagerness for public esteem keeps it in a gentle agitation ; and it is thus that a new family, recently settled in a county, at first bounded in its views, is satisfied with civilities and invitations ; becoming by degrees more difficult, it seeks for local titles and dignities ; at length, encouraged by success, it aspires if not to the high honour of a seat in parliament, at least to that of exercising a great influence over the elections.

But if the great land-holders, for the fur-

therance of their ambition, experience the constant necessity of public favour, they have, in return, an invaluable advantage in finding no impediments to it in exclusive privileges, calculated to make them objects of universal jealousy.

There is in England no nobility properly so termed, in the sense which we affix to the word. Birth, there, confers no title, no right, no prerogative whatever, except on families invested with the peerage. The English know nothing of two distinct classes as in most of the states of Europe, one noble, the descendants from the ancient conquerors, the other commoners, the offspring of the conquered, perpetuated from generation to generation, without the power of ever being mingled together. The word *gentleman*, in the sense in which we understand it, is unknown in England, scarcely is it comprehended there.

The English acknowledge as noble, *noblemen*, none but members of the House of Peers, and their eldest sons, appointed for the peerage.* The latter have not even the right of

* It is not quite the same in Ireland and Scotland. At the time of the union, as all the Irish and Scotch peers could not make part of the House of Peers of the kingdom, it was stipulated that only a limited number should be admitted, viz. twenty-eight for Ireland, and sixteen for

taking the title of Lord, and if given to them it is merely by courtesy, and the title is not acknowledged in law: they are designated in the courts, simply by their family names, to which are added these words: *commonly called Lord so and so.*

In a case where a member of the House of Peers has several titles, and where he is at once a duke, marquis, and earl, these titles are assumed in succession by the eldest son, grand-son, and great grand-son. His younger children have merely the privilege of prefixing to their names the title of *Honourable*. But as to the junior offspring of his eldest son, or those of his younger children, they can take only their plain family names.*

There are likewise titles granted to persons who are not noble, comprised in the class of *commoners*: some of these titles are hereditary, others personal.

The only hereditary title, next to that of Lord,† is that of *Baronet*: it is conferred by

Scotland. These peers, representing in the Imperial Parliament, the Irish and Scotch peerage, are nominated for life only, or for one session of parliament.

* A duke and marquis's younger children nevertheless keep the title of Lord, which they receive by courtesy, in contradistinction to those of an earl, viscount, and baron.

† There is another title of honour known in England,

the King on such as have rendered services to the state, in whatsoever capacity or situation.* This title descends to the eldest son, alone, the younger sons receiving no particular qualification.

The remaining titles are entirely personal. The first, that of *Knight*, is also conferred by the King, either by his own will, as a reward, or on request made to him for it: the other, *Esquire*, is generally given to all land-holders, as well as to individuals belonging to a liberal profession, as lawyers, physicians, bankers, merchants, &c. None but the wives of baronets and knights have a right, with those of noblemen, to take the title of *Lady*.

All other persons are *gentlemen*, corresponding to our word *Monsieur*, and this denomination is given to the people themselves, when addressed at election time.

These ranks, as well as those given by

which, although personal, comes immediately after that of Lord, namely, that of *Banneret*. It should be conferred by the King in person on the field of battle, in the enemy's presence. But this title is fallen quite into desuetude, the King having no longer occasion to command his armies in England, and not being permitted to command them abroad.

* The Lord Mayor of London is sometimes made a baronet when he goes out of office. The Prince Regent's physician was invested with the title in October, 1819.

public situations, are fixed by a regulation rigorously adhered to even in private parties, and which prevents every misunderstanding that might be occasioned by the conflict of private pretensions. This regulation, which I subjoin,* lets us into the whole scope of the legis-

* TABLE OF PRECEDENCE.

1. The King.
2. The Prince of Wales.
3. King's sons.
4. King's brothers.
5. King's uncles.
6. King's grand-children.
7. Sons of the King's brothers and sisters.
8. Archbishop of Canterbury, Lord Primate of England.
9. Lord Chancellor.
10. Archbishop of York.
11. Lord Treasurer.
12. President of the Privy Council.
13. Lord Privy Seal.
14. Lord High Constable.
15. Earl Marshal.
16. Lord High Admiral.
17. Lord Steward of the King's Household.
18. Lord Chamberlain of the King's Household.
19. Dukes, in the order of their creation.
20. Marquises, in the order of their creation.
21. Dukes' eldest sons.
22. Earls, in the order of their creation.
23. Marquises' eldest sons.
24. Dukes' younger sons.
25. Viscounts, in the order of their creation.

lator's intention, and the secret motive by which he is actuated, of establishing no dis-

26. Earls' eldest sons.
27. Marquisses' younger sons.
28. Bishops of London, Durham, and Winchester, and the other Bishops in the order of their consecration.
29. Barons in the order of their creation.
30. Speaker of the House of Commons.
31. Viscounts' eldest sons.
32. Earls' younger sons.
33. Barons' eldest sons.
34. Knights of the Garter.
35. Members of the Privy Council.
36. Chancellor of the Exchequer.
37. Chancellor of the Duchy of Lancaster.
38. Lord Chief Justice of the Court of King's Bench.
39. Master of the Rolls.
40. Lord Chief Justice of the Court of Common Pleas.
41. Lord Chief Baron of the Exchequer.
42. Judges, according to seniority.
43. Bannerets, made by the King in person, under the Royal standard flying.
44. Viscounts' younger sons.
45. Barons' younger sons.
46. Baronets.
47. Bannerets not made by the King in person.
48. Knights of the Bath.
49. Knights Bachelors.
50. Eldest sons of the younger sons of Peers.
51. Baronets' eldest sons.
52. Eldest sons of Knights of the Garter.
53. Bannerets' eldest sons.
54. Eldest sons of Knights of the Bath.
55. Knights' eldest sons.

tinction but for the public interest, and not for that of private families.

Not one of the titles just specified confers by itself the smallest privilege, whether pecuniary or honorary. Yet some vestiges of feudal rights still exist in England; but these rights are not attendant on birth, and attached to the person: they are inherent in the land,

56. Baronets' younger sons.
57. Equerries of the King's body.
58. Members of the Privy Chamber.
59. Esquires of Knights of the Bath.
60. Esquires by creation.
61. Esquires by office.
62. Younger sons of Knights of the Garter.
63. Younger sons of both kinds of Bannerets.
64. Younger sons of Knights of the Bath.
65. Younger sons of Knights Bachelors.
66. Persons having permission to bear arms.
67. Clergymen, Lawyers, Physicians, and officers of the Army and Navy, whose profession gives them the rank of Gentlemen.
68. Land-holders.
69. Merchants.
70. Artisans.
71. Labourers.

Married women are entitled to the same rank among themselves, as their husbands observe among them; and widows retain the rank of their husbands, unless these received it in virtue of their profession. Unmarried women enjoy the same rank that their eldest brothers have among them during their fathers' lifetime.

and pass, with it, into the possession of the purchaser.

The privileged estates here alluded to are termed *Manors*, and the owners of them, *Lords of the Manors*.

The privileges attached to them depend on the nature of the land contained within the *manor*, and are more or less extensive, according as the land may be *freehold* or *copyhold*.

Freeholds are estates whose ancient possessors were, personally, the proprietors, but for which they owed fealty and homage to their paramount lord. These lands were subjected, towards the owner of the lordship, to the payment of a rent of the value of two or three shillings, called *quit-rent*; and it is this due that is still paid at the present day to the lord of the manor by the possessor of the freehold, which in other respects is liable to no other species of servitude, of hunting, fishing, &c.*

Copyholds are estates which seem to have belonged formerly to the lord of the manor himself, and to have been granted by him under certain stipulations which made part of the surrender of the land, constituting, as it

* The greater part of freeholds are now discharged even from this trifling rent, either from their having been held originally of the King, who has remitted it, or from their owners having obtained their release from the rent proprietors.

were, the price of it. These estates are thus termed because the title of cession is entered on the rolls of the lord's court, the tenant having but a copy of it, which must be renewed at every change of hands. The conditions of the cession vary according to the practice of each manor.

Originally, the lord could re-enter, at pleasure, into the possession of the estate, either during the copy-holder's life-time, or at his death: but the lords, having for a long time neglected to avail themselves of this right, out of regard to their tenants' families, it became, insensibly, considered as no longer in existence, and the rather, as it was in opposition to the progress of agriculture, by placing the copy-holder and his family in a discouraging uncertainty, and in a state of dependence too near akin to servitude. At present, therefore, the tenant's heirs, or his assigns, are liable only to the performance of the conditions first imposed at the cession. The origin and cause of these conditions, too, being lost sight of by the lapse of time, they became ultimately regarded as degrading stipulations, and the spirit of the age tends constantly to obliterate them altogether. It is thus, for instance, that the *heriot*, that is, the right of the lord of the manor to select the best chattel, or the

best beast belonging to the copy-holder at his death, is now almost wholly extinct, as well by the copyholder's care to bequeath his most valuable furniture, or domestic animals, such as pictures and horses, as by the practice since introduced of delivering the articles claimed not in kind, but of submitting them to an appraisement; the price set upon them being, at the same time, always under their real value.

It is thus also that the right of property possessed by the lord of the manor over all mines discovered within the copyhold, becomes destroyed by the action of trespass, which the copyholder has the power of bringing against the lord who might wish to avail himself of his claim. This action is grounded on the copyholder's right of preventing the lord from passing over his grounds, a right which deprives the latter of the possibility of working his mines. But as the lord, on his side, may likewise hinder the copyholder from turning them to his own advantage, to obviate the frequent contests arising from the multiplicity of coal-mines, an arrangement is always entered into between the lord of the manor and the copyholder, by which the latter acquires from the lord permission to work the mines, by the payment of a sum of money, or else by which the lord obtains, for an equal consideration,

the right of way over the grounds of the copyholder.

Copyholds are becoming daily still more rare, by the common interest of both lords of manors and copyholders in putting an end to the connection created by their ancient rights, and of exchanging it for one more profitable and more in accordance with existing manners. The practice has therefore been adopted of releasing the copyholds in consideration of a fixed rent. In this transaction, the copyholder derives one distinguished advantage, besides that of liberating his estate from a servitude daily becoming more galling, the right of voting for members of parliament, in his new capacity of freeholder, a right which he did not possess as a copyholder, according to the supposition in law in which he was placed, of his being under the influence of the lord of the soil; and the latter, in his turn, finds no less advantage in a bargain which augments his real income, at the expense of rights now merely nominal, and which being already impaired by the hand of time, every day losing something of their still remaining value.

All these prerogatives, founded on the nature of the land, are, then, considered less as privileges than as species of trusts of the same nature as every other civil trust resulting from

the sale or cession of land. It will besides be readily conceived that by the flux of time, manors, freeholds, and copyholds, having passed successively into the hands of new purchasers, and having, by accident, brought with them their rights and services, could no longer tend, as they had done at first, to establish the pre-eminence of particular families; and the constitutional spirit in England, moreover, shines so resplendently, that it has well nigh extinguished by the brightness of its lustre, all those faint glimmerings which derive their nourishment solely from the remoteness of their origin.

It results, from this state of things, that all the English families are perpetually being mixed and confounded; that the most elevated, by their junior branches, return to the ordinary classes of society, and that the most lowly may rise to the nobility, that is, to the peerage, by their services and abilities. The younger children of noblemen and their descendants enter the army and navy, follow the profession of the law, or medicine, embark in trade, and in all the other occupations of the rest of society; and as they are then known only by their patronymics, their origin scarcely obtrudes itself upon their own notice, and still less upon that of their associates.

The nobility of England possess therefore this peculiarity, that the titles and prerogatives which they enjoy belong to them less as a patrimony and family-property, than as a species of concession made by the nation for the common good, and in the sole view of raising up a powerful rampart both against the ebullitions of the spirit of democracy, and the encroachments of arbitrary power. Consequently these titles and prerogatives are exclusively appropriated to the eldest; and the splendour of the rest of the family being of no utility in the end proposed by the establishment or preservation of a nobility, the younger branches, left without titles or distinctions, become simply private individuals; and the baronet but of yesterday's creation, in all public ceremonies and even in private assemblies, takes precedence of the junior descendant of the most illustrious family in England.

These titles and prerogatives, thus looked upon as necessary for the maintenance of liberty, and which all may acquire by their services and talents, far from exciting any one's envy, are rather the hope of every family, and the legitimate object of every one's ambition. Their possessors find themselves respected and honoured as public magistrates, free from all apprehension lest the jealousy of the lower

classes should impair that consideration, to which they may have an additional claim in their knowledge and personal good qualities.

The government, therefore, has been enabled, without wounding the feelings of others, to burthen itself, especially, upon titled persons, of almost all the cares of the administration of the counties: it has found them in possession of the public respect and esteem; in what better hands could it deposit its authority? We shall see in the following chapter in what manner this has been dispensed to them.

CHAPTER II.

OF JUSTICES OF PEACE, AND THEIR DUTIES.

IN each county is established a commission of the peace, composed of the principal land-owners, whether clergy or laity. Every person one-and-twenty years of age, in possession of a manor, freehold, or copyhold, producing a hundred pounds annually, clear of all charges and rates, or who possesses, in like manner, a reversion of three hundred a year, is eligible for the commission of the peace; and if desirous of being placed in it, he tenders his services to the Lord Chancellor through the medium of the lord-lieutenant of the county. It is extremely rare that such an offer is refused, when made by one possessing the qualifications which I have just mentioned.

The number of those admitted into the commission of the peace varies according to the extent, wealth and population of the county: it is fixed by no law. The princes of the blood, the lord chancellor and the principal peers of

England are included in all the commissions of the peace of the kingdom ; and these commissions contain sometimes four, five, and six hundred members.

Out of this number many land-holders are satisfied with merely having their names enrolled, which is considered as an honour ; others, on the contrary, jealous of exercising the power given them by being in the commission, procure the instrument of their nomination, take the required oath, and are thus invested with the office of justices of peace.*

In each county, there are one, two, and sometimes even three hundred acting magistrates, whose jurisdiction extends over the whole of the county. They are especially charged with the maintenance of the public peace ; and whenever any one in their county is accused of attempting to disturb it, whether by an act of violence towards a private indivi-

* The manner of verifying effectually that a justice of peace possesses the income required by law, is to make him take a particular oath, on this point. This oath is entered on the court register, and any person is entitled to demand a copy of it, and to show, against the magistrate, that he has not the required property ; should this fact be proved, the justice of peace is struck out of the commission, and fined a hundred pounds, half of which goes to the poor of the parish, the other half to the prosecutor.

dual, or merely by threats, or even by notorious misconduct, they have authority, after hearing the party in his defence, to make him enter into a recognizance binding himself to pay a certain sum to the King, should he afterwards commit any act tending to a breach of the peace, that is, should he place himself in a situation to incur a conviction for felony or misdemeanor.

The recognizances imposed by the magistrates are usually from five-and-twenty to forty pounds sterling; they are sometimes fixed at a higher sum, according to the offender's property, and the nature of the disturbance which he may occasion.

When the individual to be bound down is not in a condition to give a satisfactory security in himself for the payment of the sum fixed, so as to be held on his own recognizance, the magistrate compels him to give bail, and in default of procuring this, he commits him to gaol until some one comes forward to answer for him.

Justices of peace, that is, the chief persons of each county, have thus the power of subjecting to a security for good behaviour, or imprisonment, all such persons as may appear to them dangerous to the public tranquillity; but it must not be imagined that they can

easily abuse this power. They are responsible for all they do ; and it would be an egregious mistake to suppose that this responsibility is but an empty menace, laid down as a law not enforced, and only intended to stop the mouths of the friends of liberty.

They are not courts, composed in themselves of public officers, that are to decide upon their conduct, and upon the use which they have made of their authority, but juries, that is, persons subjected to their own jurisdiction, who are always ready to defend the weak against the strong, the oppressed against the oppressor. If, therefore, they should ever happen to exact vexatious or excessive recognizances, and in consequence of which, the person bound should be committed to prison, they would be liable, on the part of the latter, to an action of damages, and the plaintiff would receive a compensation co-extensive with the magistrates' malice and severity. They would expose themselves, besides, to be excluded in the next renewal of the commission of the peace, and to draw upon themselves the animadversion of the whole county. The result is that magistrates very rarely afford ground for just complaint against them.

In addition to these primary powers, magis-

istrates have the greater part of those which, among us, belong to commissaries of police. They grant licences for inns and public houses; appoint overseers of the poor, and churchwardens; watch over the execution of the law relative to the duties of printers; are charged with the regulation of prisons, and the administration of the money appropriated to the relief of the poor. It is to them, in fine, that law or custom has entrusted the decision of a certain number of petty civil cases, of all misdemeanors, and of a great number of cases of felony.

We shall now enter into the particulars of those latter powers which constitute one of the chief objects of this work.

Justices of peace exercise their authority in three different ways, according to the nature of the cases brought before them. They act *sometimes singly, sometimes to the number of two* in meetings termed *Petty Sessions*, which are held about every fortnight in market-towns, and other small towns of any importance; sometimes to the number of *two at least, or of several more, indeterminately*, in full meetings, termed *General Quarter Sessions*, held once a quarter, at Michaelmas, the Epiphany, Easter, and St. Thomas's day. In the former cases,

the magistrates proceed by *information*, that is, without the aid of any one, and upon the simple hearing of the witnesses and the parties: in the latter they proceed by *indictment*, that is, upon a bill of accusation submitted to the examination of the grand jury, and the decision of the petty jury.

It would be extremely difficult to specify the various cases that fall under the cognizance of justices of peace, according as they act *singly, in petty, or general sessions*: they are all laid down in particular statutes, a collection of which would form many volumes. That which may be asserted generally, is, that justices of peace act singly but for the purpose of regulating some point of police, or to bind down public disturbers in the recognizances I have mentioned; and that, in petty sessions, their duties consist in deciding, subject to an appeal to the *general quarter sessions*, upon some civil cases set apart for their decision by special statutes, such as disputes between masters and servants, masters and apprentices, paupers and overseers, districts between themselves concerning their poor, and in fixing the sum to be paid for the maintenance of illegitimate children, by their reputed fathers.

In *general quarter sessions*, to which are

summoned the whole of the county magistrates, and in which they sometimes assemble to the number of *twelve* or *fifteen*, and occasionally to the amount of *thirty* or *forty*, the justices of peace decide by *information*, upon the appeal of all causes heard in the first instance in petty sessions, and take cognizance, moreover, by *indictment*, that is, with the help of the grand and petty jury, of all the misdemeanors of their county, and of all criminal cases that are not of serious importance.*

But as almost every kind of robbery, as we shall see shortly, incurs in England a capital punishment, and as consequently the greater part of criminal cases should be sent to the courts of assize, the magistrates, in the view of easing those courts of a burden that might be too great for them, by a fiction which they countenance at the first hearing, contrive to make the *quarter sessions* competent for a multitude of cases, which, in the strictness of law, ought to be transmitted to the courts of assize; and in this way, the latter courts have to decide only on the more weighty crimes, such as rapes, murders, arsons, and robberies committed at the approach of their sessions.

* There are *quarter sessions*, however, as those of Bristol, which, by an especial privilege, are empowered to decide in all criminal cases, even capital ones.

This fiction consists, in some cases, in lessening, with the privy of the prosecutor, the value of the article stolen; in leaving out some of the aggravating circumstances, as night and house-breaking; and thus the robbery falls into the general class of felonies entitled to the benefit of clergy,* species of crimes that come under the ordinary jurisdiction of the quarter sessions.

* The benefit of clergy is an absolute exemption from the punishment of death, arrogated by the clergy in the days of their power, and of the profound ignorance of the people. Yet as they had not the hardihood to assume such a privilege in their simple character as an ecclesiastical body, they contrived to found it on the necessity of guarding learning by an especial and distinguishing protection; but as at that period even the slightest acquaintance with literature was confined to priests, few others could profit by the privilege. Extensive learning was not, however, demanded to be admitted to the enjoyment of it, since it was sufficient to know how to read; yet, so dense, at that period, were the shades of darkness, that few of the laity had even reached this first step of civilization. The privilege appearing thus peculiarly attached to the clergy, it took its name from them, and has retained it ever since. In proportion, however, with the diffusion of knowledge, every one imperceptibly became enabled to claim the privilege in his favour, and the punishment of death was almost entirely erased from the statute book of England. To re-establish capital punishments, therefore, it was found necessary to make express statutes depriving certain crimes of the benefit of clergy; and it is in virtue of these statutes that the penalty of death is now adjudged.

This kind of mitigation, however, can seldom afford an opening for abuse, inasmuch as none but crimes of a heinous character are affected by it; and indeed had these been sent to the court of assize, and, in the rigour of the law, have met with a capital conviction, they would still have become the sure object of indulgence, and the offenders have suffered only the punishment inflicted at *quarter sessions*, namely, imprisonment or transportation.

The *general quarter sessions* are included in the number of great courts of England. They are what are termed by the English *Courts of Record*, that is, courts having a record in which all their acts are entered.

The sheriff ought to be present at these courts, as at the assizes, either by himself or his deputy: coroners, constables, and bailiffs, officers whose duties I shall by-and-bye have an opportunity of describing, are also bound to attend: the bar is filled with counsel employed to prosecute or defend the prisoners, or retained by corporations to plead their cause in the frequent contests arising between them concerning their poor, so that these courts present the same solemnity and dignity as courts of assize, and possess nearly equal importance.

I think it unnecessary here to speak of the

manner of choosing and calling together the jury attendant upon the sessions of the peace, because, as such juries are collected, upon the summons of the justices of peace to the sheriff, precisely in the same form as at the assizes, upon the judges' summons, it appeared to me more convenient to refer the particulars to the chapter treating of the courts of assize.

There are often held in the same county, and in different places, several of these quarter sessions, because it frequently happens, in virtue of private acts of parliament, that the county contains towns, or districts, privileged to have their own magistrates, and which hold their sessions at the same period with those of the counties. These magistrates are generally merchants : they are termed *aldermen*, answering to our ancient échevins. As the great extent of their own business deprives them of the requisite leisure to study the criminal code, they are almost always presided over, in quarter sessions, by a magistrate termed a *recorder*, who is usually elected by the town, or by the aldermen in its name, from among the most distinguished lawyers residing in the county. This office is no obstacle to his acting professionally in courts of assize, and other *quarter sessions*.

A great part of the principal cities of England, such as London,* York, and Lancaster, enjoy this privilege. Sometimes, too, a county, Yorkshire, for instance, is divided into several districts, the magistrates of which hold their *quarter sessions* separately.

These sessions commonly last from one or two days to ten. When that time is not sufficient to determine all the causes brought before them, which generally happens, the magistrates adjourn the session to another day, and often to a different place, in the view of obviating the long journeys of the witnesses, and lessening the expense, already so extremely heavy, of criminal justice:—each county defraying its own.

By means of these adjournments, the number of quarter sessions is often prodigiously multiplied in a county. For instance, it amounts in Yorkshire to fifty-eight, in Lancashire to sixteen, according to the table below.†

* The recorder of London is a person of importance. He receives a considerable income, and no longer follows his legal profession. He has under him another officer to assist him in his duty, termed the *common sergeant*: these two officers are elected by the court of aldermen.

† *Table of Sessions of the Peace for Yorkshire and Lancashire.*

Yorkshire is divided into three great divisions, termed

When the sessions are ended, the magistrates proceed to the nominations that form part of

Ridings, distinguished by their geographical position, into *North, West and East Ridings*.

The January quarter sessions for the West Riding are held, first at Wetherby; afterwards by a first adjournment, at Wakefield, by a second, at Doncaster. Those of the North Riding at Northallerton, and of the East Riding, at Beverley, both without adjournment.

The April quarter-sessions for the West Riding at Pontefract; for the North Riding at Northallerton; for the East Riding, at Beverley, all without adjournment.

The July quarter-sessions for the West Riding, at Skipton, afterwards, by a first adjournment, at Bradford, by a second, at Rotherham; for the North Riding, without adjournment, at Northallerton; for the East Riding, also without adjournment, at Beverley.

The October quarter-sessions for the West Riding, at Knaresborough, afterwards, by a first adjournment, at Leeds, and by a second, at Sheffield; for the North Riding, without adjournment, at Northallerton, and for the East Riding, also without adjournment, at Beverley---making in the whole, eighteen general and quarter-sessions: to which must be added the quarter-sessions held in each of the following towns by their own magistrates, in virtue of their private charters, namely

Leeds - - - - -	4	Hull - - - - -	4
Pontefract - - - - -	4	Rippon - - - - -	4
Doncaster - - - - -	4	Beverley - - - - -	4
York - - - - -	4	Headon - - - - -	4
Richmond - - - - -	4	Scarborough - - - -	4
		Total - -	58

their office, as of overseers of the poor, and churchwardens.

It is also at this period they deliberate upon the amount of the rates to be levied upon the county for its private expenses, allotting them to the several parishes according to a statement of their respective incomes laid before them by the churchwardens.

The eighteen general quarter-sessions require each forty-eight jurors, making - - - - -	864
The forty sessions of corporations, at least four-and-twenty each - - - - -	960
The two criminal assizes, forty-eight each - - - - -	96
The two civil assizes, sixty each - - - - -	120
And about thirty special jurors for each of the two civil assizes - - - - -	60
<hr/>	
Total number of Jurors necessary in each year -	2,100

Without reckoning the grand jurors who, for the eighteen general quarter-sessions alone, and the two criminal assizes, amount to four hundred and sixty, at the rate of twenty-three per session.

There are but sixteen sessions in the duchy of Lancaster, namely, four at Lancaster, which are each adjourned in succession to Preston, Manchester, and Liverpool, requiring

Forty-eight jurors for each of the sixteen sessions	768
Forty-eight for each of the two criminal assizes - -	96
Sixty for each of the two civil assizes - - - - -	120
Thirty special jurors for each assize - - - - -	60
<hr/>	
Total - - - - -	1,044

Not including about four hundred and four grand jurors.

Finally, justices of peace perform throughout their counties the duties allotted in France to examining magistrates (*juges d'instruction.*)

Upon the commission of a crime, the injured party lays his complaint before a magistrate, who first swears him, and then delivers to a constable (an officer corresponding nearly with our police commissary) an order termed a *warrant*, commanding the latter to bring the prisoner before him, and to secure all the proofs of the charges. By virtue of this order, the constable* proceeds to the prisoner's residence, apprehends him, if he can, and brings him, with the plaintiff and his witnesses, before the magistrate; the latter hears them all separately, and according to the circumstances of the case, leaves the prisoner at large, or commits him to

* In large towns, the constable receives a salary, and the office is given to persons of the lower classes of society. It is not uncommon to see the constable following at the same time another calling, as that of a petty shop-keeper; but in small towns, and country places, every one is obliged to take the office in turns, and receives his nomination from the sheriff.

The constables are under the direction of a high constable, placed over each of the three or four particular divisions, into which the county may be divided. It is also the duty of this latter officer, who always receives a regular salary, to collect the fines and rates belonging to the county. He is appointed by the magistrates.

prison. He then adjourns the further hearing of the case to the first convenient day: at the time appointed, the witnesses, and the plaintiff, accompanied by his *attorney*,* come into court; the prisoner is then brought up, accompanied also by his solicitor, if he has the means of procuring one. The magistrate takes down in writing the prisoner's declaration, together with the depositions of the plaintiff and his witnesses, as they are respectively elicited by the prosecutor's or prisoner's solicitor.

These examinations take place in London in a room open to the public, by the magistrates in Westminster, and by the aldermen in the City. I have reason to think that the same system is adopted in the country, although I had no opportunity of being present there, as I had in London.† After the examination has been drawn up, the magistrate, according to the nature of the crime and the weight of the charges, discharges the prisoner altogether, or liberates him on bail, or makes out a fresh warrant, and commits him to the county-gaol, leaving the proofs of the charge in the care of the

* The attorney is an officer answering to the French avoue.

† It is the same in the country as in London: but in cases of delicacy, or in which secrecy is advisable, examinations are taken privately in both.

constable, or plaintiff. He afterwards considers, according to the nature of the offence, to what court he shall send the prisoner, to the assizes or quarter-sessions; the plaintiff and all the witnesses are then bound in their recognizances, generally of forty pounds sterling, to pay this sum to the king, in the event of their not coming forward, at the next assizes or quarter-sessions, one to prosecute the prisoner, and the other to give evidence to the circumstances within their knowledge. The recognizances and examination are afterwards lodged with the clerk of the assizes or quarter-sessions, and the recognizance, if forfeited, is rigorously levied.*

* FORM OF A RECOGNIZANCE.

That for the prosecutor is thus worded: To wit, on such a day, &c. A. (the prosecutor's name), living at, &c. came before me, one of his Majesty's justices of peace, for the county of ——, and acknowledged to be indebted to our Sovereign Lord the King in the manner following, that is to say, in the sum of £40 sterling of lawful money of Great Britain, to be levied on his goods, lands, &c. to the profit of our said Lord the King, his heirs, and successors, if the said A. should fail in the following condition:

The condition of this recognizance is, that the within-holden A. shall appear personally at the next assizes, or *general gaol delivery*, to be held for the said county, and that he will there present one or more bills of indictment against B. (the prisoner) for *burglary* (for instance); that he will prosecute the said B. conformably to law; and will not

Should the prisoner think himself wrongfully detained, he is at liberty, by virtue of the writ of *Habeas-corpus*, to complain to the court of King's Bench, who will examine into his case, and order his liberation or retention in gaol, according to the circumstances. But a proceeding of this nature is extremely rare; and it is hardly possible to cite even a few instances of it, owing to the very great precaution taken by the magistrates, in committing none to prison unless upon the strongest suspicions.

Such is the system of examination in England, which, as may be seen, is much inferior to that followed in France, although the latter, indeed, may be censured for its over-anxiety to produce the culprit's conviction. No public officer draws up a certified statement of the nature of the spot, of the victim's wounds, or of the burglarious entry. Whatever cir-

leave the court, without leave; in which case this recognizance shall be null and void, otherwise to have full force and effect. At the bottom is written, "Taken and entered into before me, the day and year above-mentioned." Magistrate's signature.

The witnesses' recognizances are exactly in the same terms, except that their condition consists in giving evidence, according to their knowledge of the circumstances, on one or more bills of indictment, to be presented to the grand jury, by A. against B. for *burglary*.

cumstances may be deemed necessary to arrive at the truth, are drawn forth by the cross-examination of the witnesses. Scarcely a single question is put to the defendant: if asked to give an account of himself, he answers, if he thinks proper, and the magistrate feels himself under no obligation to point out his contradictions either with himself or his witnesses.—Nor is he asked for any explanation of the charges resulting against him from the depositions. If able to clear them up satisfactorily, he does so, or is silent. All those pains taken in France with so much patience and acuteness, and almost always so successfully, are, in England, altogether neglected, or regarded as inquisitorial.

The English appear to attach no importance to a discovery of the causes which may have induced the prisoner to commit the crime: they scarcely even affix any to the establishment of his guilt. I am ignorant whether this temper of mind arises from their fear of augmenting the already excessive number of public offenders, or whether it proceeds from their natural humanity : it is however an undoubted fact, that they make no efforts to obtain proofs of the crime, confiding its punishment entirely to the hatred or resentment of the injured party: careless, too, about the conviction of the

accused, whether his victim shall yield to feelings of compassion, or give way to indolence.

Thus the business of prosecution, instead of being performed on the behalf of the public by an officer appointed expressly for the purpose, is committed entirely to the hands of the injured party, who, by this means, becomes the arbiter of the culprit's fate, and who, according to the state of his feelings, may follow up the prosecution to the utmost rigour of the law, abate its severity by procuring a mitigated bill of indictment, or, by abstaining from complaint, pardon the crime altogether.*

Let it not, however, be supposed that this system gives rise to general impunity. The indifference of the law is compensated by the interest of the lawyers, supposing that this indifference is not in itself the real cause of that indifference; and the number of criminals

* There are exceptions, however, in the case of murder. In every county there is a certain number of officers, termed *coroners*, elected by the freeholders, whose duty, with the assistance of twelve witnesses taken on the spot, consists in examining the bodies of persons who have suffered a violent death, and in collecting all possible information respecting the case. Should there be no complainant, it is also their duty to prosecute the suspected party.

brought to trial in courts of justice is already but too great. At a late London session there were three hundred and eighty cases.

The prisoner remains in gaol till the opening of the quarter-sessions, or the assizes, of which latter we shall now treat in the following chapter.

CHAPTER III.

OF THE ASSIZES, AND GRAND AND PETTY JURY.

THE assizes are held twice a year in all the counties of England, with the exception of the four northern ones, (Durham, Northumberland, Cumberland and Westmoreland,) where they are held but once a year,* and of London and Middlesex, where they are held eight times a year.†

During the interval between the prisoner's apprehension and the opening of the assizes

* A second assize was lately appointed to be held in these counties, as in all the others.

† The London assizes are opened by one of the judges, who sits the first day, and occasionally a second; they are then continued by the Recorder and Common Serjeant.

The civil assizes, called *sittings*, are always held by one of the twelve judges, namely, four in Westminster for the county of Middlesex, and four at Guildhall for the City of London. The former begin immediately after the *terms*, which will be treated of in another chapter; the latter, the day after the closing of those of Westminster. These *sittings* last about a fortnight.

or quarter-sessions, the plaintiff's attorney, having received a copy of the examination, draws up, from the prisoner's own confession, or from the witnesses' depositions, a bill of indictment, that is, a kind of act of accusation, containing a statement of the charges, in readiness to be laid before the grand jury at the assizes or quarter-sessions.

England proper is divided into six circuits, including all the counties; the circuits are held in the following manner: those in summer, called the *summer assizes*, in July and August; those in spring, called *lent assizes*, in March and April. Wales has circuits of its own: Scotland and Ireland have also their own judges and usages.

Two of the twelve judges are commissioned by the King to hear and determine all civil and criminal causes that may be brought before them in each of the circuits. Before their departure, they fix upon the opening of the assizes in each of the towns of the circuit, according to the nearest information they can obtain of the number of cases in each county.

All the barristers of England are likewise classed among each of the six circuits, and must not act professionally out of their own limits, except at London, in the courts of

King's Bench, Common-pleas, and Exchequer, of which I shall speak hereafter.* They fix themselves in the circuit likely to be the most profitable; and after having made their election, are not allowed to choose another: although instances may be adduced, in the early part of their reception, but then only once, of their having been permitted to practise in another.

Most of these barristers live in London, especially those of longest standing and of most eminence, and they rarely plead within the boundaries of their circuit, except at assize time, and in the courts of assize only in such civil cases as produce the most lucrative briefs. Barristers who have less practice during the assizes, remain in one of the counties comprised in their circuit, and follow the sittings of the *quarter-sessions*.

On the day fixed for the assizes, all is bustle in England. The barristers set out from London with the judges for their respective circuits; Sheriffs,† jurors, high constables, coroners, justices of peace, plaintiffs, witnesses, all start off for the assize-town.

* There is also a great number of practitioners in the court of Chancery, who very seldom go the circuits.

† The Sheriff corresponds nearly with the French prefect.

The judges, upon their approach to the town, are received by the sheriff, and often by a great part of the wealthiest inhabitants of the county; the latter come in person to meet them, or send their carriages, with their richest liveries, to serve as an escort, and increase the splendour of the occasion.

They enter the town with bells ringing and trumpets playing, preceded by the sheriff's men, to the number of twelve or twenty, in full dress, armed with javelins. The trumpeters and javelin-men remain in attendance on them during the time of their stay, and escort them every day to the assize-hall, and back again to their apartments.

On the day appointed for the opening of the King's commission, one of the judges proceeds with the sheriff to the court, and reads the commission publicly. The court is afterwards continued on the day following.

The next day the two judges proceed to the court with the sheriff, in the form just mentioned. One presides in the civil, the other in the criminal court: the sheriff in person remains, during the whole of assize time, with the judge of the criminal court.

The business of the latter commences by calling over the names of those composing the commission of the peace; then the

names of the coroners and high-constables, the first of whom as they are called, lay before the court a statement of all homicides committed within their districts; the second make a presentment of the state of the parishes under their inspection, with respect to public morals and tranquillity.

This business ended, the grand and petty jury are then called over.

It is here the proper place to enter upon the circumstantial details of the subject forming the main point of this work.

In England there are two species of juries, such as we ourselves possessed some years ago, one the grand jury, which decides whether the accused shall be brought to trial, the other the petty jury, which gives its verdict upon the charge.

The grand jury is composed of the principal land-holders of the county, and more especially of almost all such as are in the commission of the peace. There are no laws declaratory of the particular qualifications for a grand juror, but the practice is to appoint none but gentlemen of the greatest property, and of most consideration in the shire, such as baronets, knights, and esquires.

The sheriff strikes the grand as well as the petty jury; and to give a complete notion of

the impartiality and indifference with which they are impanelled, it is indispensably necessary to explain the manner in which this officer himself is appointed.

Next to the Lord-lieutenant,* the sheriff is the chief officer of the shire. It is his business to maintain order, and to see that all laws and judgments, and apprehensions, when ordered, of any of the inhabitants of his county, are put in execution. For this purpose he has under his orders officers termed *bailiffs*, answering to our huissiers, and who, in his name, are charged with the execution of sentences, and of all acts pertaining to them. He has gaols called *sheriffs' gaols*, which are under his direction and responsibility. They are what are termed among us *houses of arrest*, in which are confined all who are committed to take their trial at the assizes, and such as have been convicted, and are waiting for execution. Penitentiaries and houses of correction are especially under the inspection of justices of peace.

* The Lord-lieutenant is a peer of England, living in the county, and having under his orders all its civil and military authorities. He is *custos rotulorum* of the county, that is, keeper of its archives; the clerk of the peace is his officer. The situation of Lord-lieutenant, however, is merely one of honour.

The sheriff has the appointment and dismissal of the gaolers of his prison: he is answerable for the external legality of the acts by authority of which prisoners are brought in, and also for their escape.

His situation is one of honour, the expenses of which are estimated at from six to nine hundred a year. It is regarded as a public charge, from which there is no exemption except upon legal excuse, and is but little courted by the wealthy, unless such as have recently risen in the county above the ordinary classes, who may have an interest in obtaining some distinction or eminence; or who otherwise regard the office as a step to the representation in Parliament.

The office is annual, and the same person may not be re-appointed for the year following. He was chosen formerly by the inhabitants of the county: at present his nomination takes place in a manner somewhat less popular. At each summer assize, the acting sheriff presents to the judges, a list of six gentlemen of the county, whose conduct and personal qualities render them worthy of the office, and presumed by their property in a condition to sustain its expenses. The judges, upon their return to town, examine the lists, meeting for this purpose on a specified day in November:

they select one of the names in each list, to be laid before the King for his approval, who rarely fails to confirm the selection.

It is no uncommon thing for those put in nomination, to make a representation to government, begging to be excused from serving the office.

The vast difference created by this system of nomination and all its accompaniments, between the sheriffs and our prefect, and the independence enjoyed by the former, may be readily conceived.

As the only advantage to be derived from the situation consists in augmenting their importance in the shire, they make every exertion to satisfy public opinion, and avoid all acts which might turn it against them.

Here, then, lies the grand secret of the perfection of the English government. Almost all public situations, of judges, sheriffs, jurors, and justices of peace, are so constituted as to incite in their possessors no interest but that of obtaining the regard and affection of society, thus constraining them to suppress all petty animosity and personal irritation, that they may apply themselves solely to ascertain and follow the direction of public opinion.

Sheriffs thus appointed are incapable of selecting any but impartial juries, in the

choice of whom there can never arise the slightest suspicion. The most trifling circumstance indicative of a sheriff's intention to give a preference of one man to another,* would raise against him so universal a cry throughout the county, that no private consideration can ever be a sufficient inducement to run such a risk.

Every one esteems it an honour to be on the grand jury; and although more than twenty-three persons are not legally requisite to constitute it, yet the sheriff, out of courtesy to the principal gentlemen of the shire, include sometimes as many as a hundred in the list sent to the assize-court, it being understood, however, that no more than the first twenty-three are to present themselves.

To enable the reader to judge of the importance attached to the functions of grand

* Juries are not impanelled by the sheriff himself; this business, as well as all the rest pertaining to his office, is confided to the *under-sheriff*, an attorney chosen by himself, who is liberally remunerated for his trouble by dues set apart for this purpose. But as the sheriff is obliged to sign all acts belonging to his situation, and these being considered as emanating from himself, with him rests all their responsibility. For his own security, therefore, he never fails to take bond of his under-sheriff, to indemnify him for all losses consequent on his under-sheriff's own acts.

jurors, and of the strictness with which they are performed, it may be sufficient to mention that at one of the Gloucester assizes, delayed for a week by an unforeseen event, the Marquis of Worcester, the Duke of Beaufort's eldest son, and one of the greatest noblemen in England, when appointed *foreman* of the grand jury, being on the point of setting out to join the Duke of Wellington in Belgium, and having made his preparations to leave England on the supposed day for closing the assizes, suspended his departure, risking rather the loss of the object of his journey, (of being present at the grand reviews,) than leave to another person of the county the honour of being foreman, that is, chief of the grand jury during his absence.

Such is the animating spirit in all public duties: no one dares neglect them, lest he should lose his consideration and influence in his county, and see them transferred to another, ever ready to grasp at them.

True, the English experience much greater facilities than we do, to reach the spot to which they may be summoned. A thousand means of conveyance are at hand. The roads, crossing and re-crossing England in all directions, are kept in an order nearly inconceivable, from London, to the most distant

parts of the kingdom.* Besides, the English consider no sacrifices too great for the purpose of procuring horses; this is their first comfort as soon as they have risen in the world, so that they are never at a loss to begin a journey. A thousand stage-coaches pass at all hours, drawn by fleet horses, which would never be supposed destined for such a service. By their celerity the distance disappears; and in the inns scattered in profusion on the roads, and kept with the minutest attention to cleanliness, the fatigues of the journey are forgotten. In this way, then, the grand and petty jurors arrive, sometimes from a distance of eighty miles. It is extremely rare that any of them fail, although the number required for each assize is at least a hundred and eight, not including grand and special jurors. The number of jurors for the whole year, in Yorkshire, amounts, for example, to more than two thousand, according to the table before given.

Those who absent themselves must make affidavit before a magistrate, declaring their

* The roads are from five-and-twenty to thirty feet wide, except a few at the approach of towns, where they are somewhat wider. Most of them have footpaths, raised two or three feet above the carriage-road, to preserve the foot-passengers from coaches and horses.

incapacity for the duty. They afterwards transmit this affidavit to the court, with a statement of their reasons for not being at their post. If grounded on any infirmity, or actual indisposition, they add as a voucher, their physician's certificate. But it must not be imagined that such excuses are lightly received: they are read in the hearing of the other jurymen, and on the least suspicion of their veracity, the court sends for the physician who had signed the certificate; and makes him swear to its truth. What physician, in the face of the inhabitants of his own neighbourhood, would dare to certify a jurymen's incapability, when conscious that all the world knew to the contrary?

When a jurymen alleges no ground of excuse, or the judge finds it unsatisfactory, he is subjected to a fine of at least forty shillings, and not exceeding five pounds; but in the event of ill-will on his part being suspected, his name is called at each cause, and each time he is fined as an absentee. I was informed of the case of a jurymen at York, who had been fined in a single session, £500. These fines are strictly levied: they are followed up by an arrest, as in all cases of civil debt, and are regarded by the public with an eye of especial favour, being considered as a

proof of the judge's attachment to the trial by jury, an institution esteemed by the English the main pillar of their liberties.

Grand juries, besides their principal duty, of deciding whether prisoners are to be brought to trial, (a duty which I shall presently have an opportunity of noticing,) are empowered to inspect the prisons, hear complaints from the prisoners, and, further, and in this consists one of the most valuable branches of their office, to make representations to government upon all points of the private administration of the county, or the general administration of public affairs. So that if any road or bridge should be out of repair; if it be thought advantageous to open a new road, or construct a new bridge; if any gaming-houses or brothels have been opened in their county, or manufactories by which the public health may be endangered; if the funds for the relief of the poor are misapplied; if any magistrate, even the sheriff himself, should abuse his authority; if a tax appear too onerous for the county in particular, or if any great question of general interest be agitated in parliament,—the grand jury have the right of making their observations on all these different subjects. For this purpose, they frame a memorial, which their foreman reads

in open court, and then confides it to the judge, with a prayer to lay it before the King.

It was in this manner I saw the grand jury of Durham complain of the slowness of building the new prisons; and that of Carlisle, of the bad condition of the old ones.*

The grand juries of the assizes are not the only ones who enjoy this privilege: those of the quarter-sessions, taken from an inferior class of society, justices of peace of each county, inhabitants of towns assembled by their mayor, and freeholders by the sheriff, have all the same prerogative, and use it with equal freedom. To give an idea of their independence, I will here relate what happened in the case of the celebrated Dean Swift.

Government having issued an order for introducing a copper coinage into Ireland, a measure, for what reason I know not, extremely obnoxious to the Irish, and appearing to them contrary to the interests of the country, Swift wrote a very violent pamphlet against the innovation; and the pamphlet ob-

* It is to the grand juries of Cumberland and Westmoreland that the four northern counties owe the advantage of having two assizes every year like the other counties of England. This important object constituted in 1818 the subject of their deliberations.

tained so much celebrity that government determined to punish its author and publishers. In consequence, a bill of indictment was presented to the grand jury against a bookseller charged with selling the pamphlet, and the judge enjoined them to inquire into its allegations with the greatest severity; but, proceeding, on the contrary, of their right of representation, they addressed a very spirited remonstrance to the judge himself, against the measure taken by government, in which were reproduced Swift's own arguments in the asserted libel: they declared the introducers of the new coinage enemies to the country, and compelled government to rescind its order.

It is the natural result of these civil and paternal duties, and of the zeal and firmness with which they are performed, that grand juries in England enjoy such vast consideration, and that their remonstrances have so much weight with government, by whom they are considered as the pure emanations of public opinion.

Nor must it be supposed that their prison visitations consist merely in a slight and cursory glance at the place and the prisoners: they go in a body, and are therefore enabled singly and out of the presence of the keeper,

who usually remains with the foreman, to question the prisoners privately, and ascertain their real wants, as well as whatever ill-treatment they may have experienced. Most of them besides, being justices of peace, and in this capacity charged with the superintendence of prisons, a duty which they perform most religiously, never fail to visit them all about once a fortnight, to write on the keepers' books, which I have seen, the observations they may have occasion to make, and to leave the prisoners some mark of their generosity..

No prisoner can be concealed from the grand jury. At the opening of the assizes, a list of all persons confined in the sheriff's prison is printed and published by the keeper, under his own responsibility, and there is probably no instance of a keeper's daring to conceal a single one.

This list, called the *Crown Calendar*, is profusely distributed over the county, that every one may know the number in confinement, and the cause of their detention. It discriminates those confined by virtue of a sentence, from those committed after examination and by a magistrate's warrant. There can never be any others, with the exception of prisoners for debt, who form a distinct class.

All the prisoners must be brought to trial at

the assizes, and be either convicted or acquitted.

Under no pretence whatever may the trial of any prisoner be deferred to another session, unless in case of illness, or of a request made by him for the sake of his own defence; and if the proofs against him are not all in readiness, or if the prosecutor or some witness should not appear, he avails himself of these circumstances, and is either tried upon the evidence before the court, or discharged *by proclamation*.

It sometimes happens, however, in grave offences, that the judge, upon affidavit of the prosecutor or his attorney, alleging the unforeseen absence of a necessary witness, puts off the trial to the next assizes; but in this case the prisoner is generally liberated on bail, unless for murder, rape, or such other heinous offence. In all other cases, prisoners, as I have already said, are either tried or discharged.

For this purpose the judges receive a commission of *gaol-delivery*, commanding them to clear the prisons: and as the list of acquittals and convictions is also printed at the end of each session, the whole county is a witness of the manner in which the judge has discharged his duty; and he would undoubtedly be im-

peached in parliament; if from any suspected or unsatisfactory reason, he should leave the place without deciding upon the fate of all the prisoners. At almost all the quarter-sessions, a Grand calendar is likewise printed, attended with the like benefits. On this subject, however, there is no particular law: but as publicity appears to be English of such essential necessity, there is scarcely a single affair of public interest but what is subjected to it. The petty as well as grand jury are also named by the sheriff, and for the same reason struck with equal impartiality. Every person in England having ten pounds a year in land, freehold or copyhold, and six in Wales, is eligible for the jury, and is put down in the list. The number of jurymen consequently varies in each county, according to its wealth and population. In Yorkshire, the largest county in England, it is reputed to amount to about ten thousand, without including the jurors of *Borough-towns*, that is, towns privileged to have their own magistrates, and of which the inhabitants perform the duty of jurors for their own town only, and not for the county: in Lancashire the number amounts to about eight thousand. Surgeons, physicians, apothecaries, as long as

they follow their professions, barristers, (*servants at law, counsellors*); attorneys, and officers of courts, clergymen, or persons in holy orders, coroners, military and naval officers, soldiers and sailors, peers, members of government, quakers, and old men seventy years of age, are exempted from serving the office.

Each county has its particular regulations, grounded on acts of parliament fixing the time that must elapse between the successive calls upon each juror for his attendance, and prescribing the system to be adopted in all other concerns relating to them.

The object of these regulations is to determine the difference which the wealth and population of each county necessarily creates in the service of their respective jurors.

In Yorkshire, for instance, jurors can be summoned to attend only once in four years, whilst in Lancashire once in three years is the prescribed time: in other counties, every two years, and in Rutlandshire yearly.

In Yorkshire, they are divided in the general list into two classes: those having an income above £150 a year, and those with an income under this sum. The former are selected for assizes, which are always more expensive, because of longer duration and from their sitting in a distant town; the others, for

that of the quarter-sessions, which are held nearer their own homes. The sheriff subjects himself to a fine of £20, in case of his summoning for the quarter-sessions, persons having an income of £150 a year.—Such must, as a matter of course, be reserved for the assizes.

In other counties, these two divisions also exist: but the income necessary for service at the assizes is not always fixed, and the amount is left in the sheriff's discretion, who reserves bankers and merchants for the assizes, and shop-keepers for the quarter-sessions.

The general jury lists are made out in the following manner. Every year, about Michaelmas, the petty constables put down such as are liable in their districts to serve on the jury, namely, all who are one-and-twenty years of age, and in the receipt of a landed income of at least £10 a year, freehold or copyhold. To ascertain this, they apply to the register of taxes. This list is stuck on the walls of the parish church for twenty days, every one thus having the opportunity of inspecting it, and of complaining to the constable, either to be struck off, as not having the required age or income, or in the contrary case, to have his name inserted.

Should the constable persist in wrongfully detaining any person upon the list, he may be

summoned before one of the county magistrates, who decides the question of eligibility upon the complainant's oath, or that of a single witness, and if there should appear to have been any vexatious conduct on the part of the constable, the latter is liable to be fined twenty shillings. This decision is afterwards sent to the quarter-sessions, and the clerk of the peace is ordered to insert or erase the name, according to the circumstances of the case.

The petty constables' lists are sent to the high-constables, after declaring upon oath before a justice of peace, that they are made conscientiously, and to the best of their knowledge. The high-constables, in their turn, transmit them to the clerk of the peace for the county, after making an affidavit that they are just as they received them from the petty constables, and without alteration. From all these lists, the latter makes out a general one, which he is obliged to transmit to the sheriff by a fixed day, under the penalty of being fined. The sheriff himself would be subjected to pay a fine of £20 were he to add to the general list a single name not found upon that of the clerk of the peace.

It is thus that the sheriffs have every year a new list of all who are qualified in their

county to serve on juries, out of whom he can make a sure choice, without running the risk, like the prefects of France, of making a selection from antiquated lists of persons either dead, or who have left the place, time out of mind.

In the book which contains the general jury list, there is written every year in red ink, by the side of each name, the date when the person was summoned on the jury, thus furnishing a check against his being called sooner than he ought to be.

All these minutiae are attended to with the greater exactness, because the sheriff is responsible for the qualifications of all the jurors presented by him, and if, in consequence of an erroneous presentation, the number of jurors should prove insufficient, he subjects himself to a very heavy fine.

Let us now return to the assize-court. After the grand jury has been called over, their foreman takes the following oath:

" You shall diligently inquire, and true
" presentment make of all articles, matters,
" and things as shall be given you in charge,
" or otherwise come to your knowledge,
" touching this present service. The King's
" counsel,* your own, and your fellows'

* This relates to the private information received from justices of peace, and secrecy is enjoined to prevent the ac-

“ you shall well and truly keep secret. You
“ shall present no man for hatred, malice, or
“ ill-will, nor leave any unpresented for fear,
“ favour, or affection, or for any reward, hope, or
“ promise thereof; but in all your presentments
“ you shall present the truth, the whole truth,
“ and nothing but the truth, according to the
“ best of your skill and knowledge. So help
“ you God.”

The grand jury in succession then take their own, which is thus conceived:

“ The same oath your foreman has now
“ taken before you on his part, you and every
“ of you shall well and truly observe, and keep
“ on your respective part. So help you God.”

The grand jury, as I have explained, ought to be generally, and I have always seen them, twenty-three in number, so that their votes, which are always given by a simple majority, may at least consist of a majority of twelve. This number, however, is not strictly necessary: it may be twenty-two, twenty-one, or twenty, and so on down to twelve; in the latter case, the votes must be unanimous, in the others there must be at least twelve for the finding of the bill.

eused from concerting his defence, and to lull his accomplices into security, if he has any, and who are not yet apprehended.

This necessity is grounded on the fundamental maxim of English law, that no one shall be condemned except by the consent of twenty-four of his countrymen: which always takes place, since the decision of the grand jury must be formed upon a majority of at least twelve votes, and that of the twelve petty jurors must be unanimous.

The petty jury are then called over. The number formerly impanelled was only twenty-four; but this being frequently exhausted by challenges, as will be seen presently, and the manner of replacing them producing inconveniences, of which I shall also speak, the practice was introduced of impanelling eight-and-forty.

The calling over is preceded by a proclamation of the following sort, made with a loud voice by the court-crier:

“ You, goodmen, that are impanelled
“ to try between our sovereign lord the King
“ and the prisoner at the bar, answer to your
“ names, every one at the first call, on pain
“ and peril that shall fall thereon.”

If any make default, he thus addresses them:

“ You of the jury who were even now called
“ and made default, answer to your names
“ and save your fines.”

If they do not make their appearance, the fine is declared.

These calls being over, the judge makes a short address to the grand jury, reminding them of their duties, and by what principles they should be guided. He then makes some observations upon such of the cases before them as appear to need it, and dismisses them to their room, with a request to proceed, with all possible dispatch, to the consideration of the first case, that the court may forthwith commence business.

I may here mention that in England there is no necessity to give much instruction to jurors upon the nature of their duty. Every man is so accustomed to the institution; a knowledge of all their constitutional laws, and more especially those relating to the trial by jury, is so generally diffused, that it is extremely rare to find a juror not thoroughly acquainted with what his country expects from his zeal and integrity.

The foreman of the grand jury is, besides, always one of the most distinguished gentlemen of the shire, the eldest son of a peer, or member of parliament, or other person of equal distinction, which is of course saying that the foreman is a man of the greatest discernment in his county: for, in this country, where per-

sonal consideration is paramount to all other, to that even of rank and fortune united; where Sir Samuel Romilly knew of no name that might eclipse his own, it is by individuals of the higher classes that the greatest exertions are made for the acquisition of knowledge. They are impressed with a conviction that they especially stand in need of some personal consideration in addition to that derived from their social position, and are unwilling to expose themselves to the bitter vexation of being deprived of the first of these advantages, when, for the interest of the public, the enjoyment of the latter has been lavished upon them in such galling profusion.

The grand jury form themselves in their room into a kind of court, under the presidency of their foreman. The plaintiff in the first cause, with his witnesses, now enters: the former states his case with the circumstances of the crime of which he has been the victim; the others make their depositions; the jury then deliberate on the presumptive proofs against the accused; if sufficiently convincing, the foreman writes at the foot of the indictment, a *true bill*; in the contrary case, *no bill*.

Whilst the grand jury are in deliberation on the first case, the court remain unoccupied. The clerk takes the list of the petty jury, and

calls over, at hazard, the names of the twelve jurymen for the first trial. The judge fills the interval in reading the informations, the counsel their briefs, and the public in forming conjectures on the business of the session.

But this interval seldom lasts more than half an hour, as the clerk of the indictments takes care to lay before the grand jury the clearest cases, and the grand jury soon enter the court with a true bill.

Robberies are divided into *petty* and *grand larcenies*. All robberies of the value of a shilling and under, are *petty larcenies*; all above a shilling, *grand larcenies*.

Petty larceny is punished with imprisonment, whipping, or seven years transportation.

Grand larceny is punished with death; but as all who are guilty of crimes of this class, are, generally speaking, admitted to the benefit of clergy, grand larceny is no longer considered in itself as a capital crime, and receives a punishment less than death, namely, imprisonment, or transportation for seven years, fourteen, or for life, according to the gravity of the offence. This relaxation, however, from the primitive severity of the law, is little more than nominal: since a multitude of acts of parliament have been passed taking away the benefit of clergy from those guilty of this crime, in so many in-

stances, that the punishment of death is restored in almost all cases of grand larceny.

So that, for example, if the grand larceny consists in sheep or horse-stealing; or in stealing any articles exposed publicly; or if it amounts to five shillings not in a dwelling-house, or to forty in a dwelling-house, the punishment is death.

Further, any robbery, however trifling in value, committed in a house, during the night-time, and with a forcible entry, and thus constituting a *burglary*, incurs also the penalty of death: so that by means of all these exceptions and of many more, too numerous to be detailed, robbery in England is generally followed by capital punishment.

Were these barbarous penalties rigorously inflicted, a place of execution in England would become a vast charnel-house, and the whole nation would rise up with one general exclamation of horror: but with the exception of murder, and occasionally rape, or forgery, or of uttering forged bank-notes, the punishment is always mitigated by the judge, who, in his capacity of King's commissioner, has the power of commuting it, under the condition, however, of the commutation's being ratified by the King, who is in the constant practice of

doing so. Thus the penalty of death is in fact pronounced merely to satisfy the law; and, according to the offence, imprisonment, or transportation for seven years, for fourteen, or life, is substituted. Even the punishment of transportation itself is scarcely ever inflicted on those cast for not more than seven years. They are usually imprisoned for the term in houses of correction, and kept to hard labour when any description of business is carried on in the gaol.

Convicts sentenced to fourteen years transportation are confined in the county-gaols till the period of their embarkation, and in the interim are employed in public labour: when they conduct themselves well, and appear to wish it, they are very often kept in England.

But although there are few instances, with the exception of the cases I have just mentioned, in which capital convictions are not commuted, I saw nevertheless some wretches executed for stealing a single sheep, and others for *burglaries*: but this rarely happens, except when the number of robberies requires a great example to be made, or when the prisoners are notorious and hardened offenders.

The judges have thus, as it were, the power of life and death over all those convicted by the jury. I am sufficiently aware that this

power is confined in practice within very narrow bounds: but they are still left a latitude that would be truly alarming, were the privilege confided to magistrates less lenient or respectable. If we reflect that from ten to twelve hundred capital convictions take place every year in England,* and that the judges have the power of disposing, at their will, of the fate of all these wretches; that they may suspend the punishment of death over the heads of these twelve hundred, and fix it on such as they may choose to single out, it will be allowed there is something so exorbitant in this stretch of power, that it would seem improper to confide it to the hands of any man, even those of Socrates himself.

The question then, resulting from the indictment, is always complex: the accused is arraigned either as guilty of *felony* in committing a robbery in value above a shilling; or of murder, or only of an attempt at murder; or of any other act classed by the law in the number of felonies; or as guilty of *burglary*, in robbing by night with forcible entry, in a

* In 1818, twelve hundred and fifty-four were condemned to death, out of whom ninety-seven only were executed. There were thirteen hundred and two in the year before, out of whom a hundred and fifteen underwent the sentence of the law. This makes not quite one in thirteen, in the first case.

dwelling-house; or of *manslaughter*, in slaying an individual without premeditation; or, finally, of petty larceny, in committing a robbery under the value of a shilling; or of a *misdemeanor*, that is of a simple offence, in having committed an assault.

When, in the case of a prisoner's being accused of felony, the grand jury find the robbery under the value of a shilling, they write upon the bill, *true bill for petty larceny*: because, on account of its smallness, the robbery is no longer a felony, but a simple offence: if the prisoner is accused of *burglary*, and the grand jury consider the circumstances either of night or forcible entry, as not verified, they write upon the bill, *true bill for felony*, in order that the accused may only be sentenced to imprisonment or transportation, if, according to the value of the article stolen, he be admissible to the benefit of clergy. So also in the case of murder or of attempt at murder, when the premeditation appears to them not sufficiently established, instead of saying *true bill for murder*, they write *true bill for manslaughter*.

But all these discriminations, as will be seen, are extremely rare on account of the rigour of the general law, which comprehends almost all cases in its inflexible severity.

As the grand jury advance in their examination of the different bills, they come into court, and present them to the clerk, who reads them with a loud voice; they then return to their private room, and proceed successively to the examination of all the indictments brought before them. Their business is commonly terminated within the first three or four days of the session.

They next visit the prisons, and draw up such remonstrances as they may have to make to government on the points before mentioned. They then ask to be discharged from their duty, and return home.

The prisoners against whom indictments are found, are tried in succession by the court, as the grand jury bring in their *true bills*, and in the order appointed by the judge: for as the cases are dispatched with incredible rapidity, it is impossible to foresee the day on which any particular prisoner will be tried, and therefore the witnesses in each cause are summoned to attend on the first day of the assizes, and are bound to remain in court until the cause upon which they have been summoned has been decided.*

* Witnesses receive 7s. 6d. a day, and in addition are repaid their travelling expenses, at the discretion of the clerk.

It is a truly admirable spectacle to see the two juries acting, each separately, yet at the same time, one upon the bills presented, the other upon the bills found. What a saving of time and fatigue for the witnesses, who have only once to leave their homes; who, upon quitting the grand jury room, proceed forthwith to give their evidence before the petty jury, and are thus enabled, in a single day, to acquit themselves towards society of all the obligations incurred by their chance knowledge of the circumstances of the case! How much more satisfaction must the grand jury feel in being able to ground their decisions upon the oral depositions of the witnesses, than our judges can experience in the written testimony upon which alone they are allowed

All these charges are defrayed by the county, which also reimburses to the plaintiff all his other expenses, for himself and his lawyers.

The following is a statement of expenses incurred in a case of manslaughter:

	£.	s.	d.
Prosecutor's expenses - - - - -	29	18	8
Surgeon, four days' attendance, and journey	4	16	6
Four witnesses - - - - -	1	10	0
	<hr/>		
Total	36	5	2

The expenses of the York Lent-assizes, 1818, amounted to £1,774 3s. 9d.

to found theirs! How affecting, in short, is this sacrifice made by a whole nation, permitting the intervention of no government agent between it and the defendant; taking upon itself the burthen of conducting every part of the prosecution, the first hearing, the finding of the indictment, and conviction of the offender; leaving to the depositaries of the sovereign's authority no care but that of directing it in all these different branches of the procedure, and of pronouncing the penalty of the law upon the culprit!

When the prisoner appears at the bar, the clerk reads with a loud voice the indictment against him; says it has been found by the grand jury, and asks the defendant if he wishes to plead *guilty* or *not guilty*, that is, if he acknowledges his guilt or maintains his innocence.

When the prisoner pleads guilty, (and this often happens, from the certainty, in this case, of a commutation of the punishment,) the judge cautions him that the crime alleged is capital, and that it is his interest to defend himself; the clerk, the gaoler, almost all the counsel, even the prosecutor's, persuade him to take the chance of an acquittal: but should the prisoner, in spite of these earnest solicitations, persist in acknowledging his guilt, he

is remanded to prison, and condemned without trial, upon his own confession.

When, in a contrary case, the defendant pleads *not guilty*, the clerk asks him how he will be tried; the defendant answers, or it is answered for him, (for this is merely a simple formality,) *by God and his country.** The clerk then says, God send you a good deliverance! He then informs him in these terms that he is going to draw the jury, and that he may exercise his right of challenge:

“ You now, prisoner at the bar, these men
“ which you shall hear called, are to pass
“ between our sovereign lord the King and you
“ upon trial of your life and death: if you will
“ challenge them or any of them, you must
“ speak to them as they come to the book to
“ be sworn, before they are sworn.”

The drawing of the jury is not made by ballot, as it ought to be, strictly, the law prescribing that the names of all the jurors are to be written on slips of paper, and dropt into a box, from which they should be taken one

* This declaration was formerly of great import, expressing the defendant's choice of this mode of trial, preferably to that of the ordeal by water and fire, or of the judicial combat; but as there is now no other form of trial than that by jury, the words are become useless, and have no longer any meaning.

after the other. The clerk is commonly satisfied with taking the first twelve names on the list, or any twelve names called at hazard.

For greater expedition, it is contrived (and it is in these particulars, so valuable in practice, that the English procedure is principally superior to ours,) to bring up all the prisoners whose trials may be dispatched in a morning; they are sometimes to the number of ten or twelve, for whom one single jury is set in order, which, after hearing at once, all the indictments relating to each defendant, are sworn in for the trial of the whole.

It is unnecessary to mention, that if, in the course of the business, and before the commencement of a fresh case, a juror, or several, or all, should be wearied out, they would be replaced by others, who must be sworn in, and to whom the *indictments* must be read over again; but such changes seldom occur, and a jury, once chosen, usually goes through the whole morning's business, without interruption, thus producing a most valuable saving of time.

Every defendant, as well as plaintiff, has a right to make his challenges, at first to the whole list impanelled by the sheriff, and should they fail in getting it annulled, then to each juror individually.

The first mode of objection is termed *chal-*

tende to the array, the second, *challenge to the polls*.

Each of these two modes may take place in two different ways, either by *principal challenges*, or *challenges to the favour*.

Principal challenges are founded upon circumstances, the consequences of which need not be appreciated, but the mere existence of which, implying, in the terms of the law, a want of impartiality in the sheriff, or juror, is sufficient, if the *challenge* is *to the array*, to annul the whole *array*, or list of jurors, and if the *challenge* is *to the polls*, to have the juror erased from the list.

The most usual of the above circumstances are, first, when the sheriff, and secondly, when the juror is a relation of one of the parties within a prescribed degree, has a law-suit with him, &c. &c. There are others that concern the sheriff alone, which may cause the *array* to be annulled, as the appointment of any of the jury at the solicitation of either of the parties;* and others peculiar to the

* There was formerly a very singular ground for a principal challenge, in the case where a peer was party to the suit: it was derived from the sheriff's forgetfulness in not including one knight, at least, in the number of jurors, and the reason given by authors was, that the interest of private individuals required this especial choice, because, say they,

jurors, in consequence of which they might be rejected from the pannel, as, for instance, when it can be proved they were not in full possession of their mental faculties, were foreigners, not of the required age, had been convicted in a court of justice, &c.

Challenges to the favour are those founded upon circumstances of which the consequences, on the other hand, are susceptible of appreciation, and may be considered as having or not having an influence over the sheriff's choice, or as calculated to influence the verdict of the jury. Thus, for instance, if there should exist a distant relationship between the sheriff or juryman, and either of the two parties; should one of the parties hold lands on lease either from the sheriff or juror; be the intimate friend of either, or his colleague in any public or private situation,—there would be ground, according to the presumed influence of these circumstances on the sheriff or jurors, to annul the array or dismiss the jury.

There are still two other kinds of challenges peculiar to criminal cases. The first is only to the *polls*, that is, to jurors individually; and the second, either to the *polls* or to the *array*, to the jury individually, or to the whole list.

The first is termed *peremptory challenge*, a knight was presumed to be a man of courage and not afraid to look a peer in the face.

and was established only *in favorem vitæ*, in consideration of the prisoner's life. This mode of challenge consists in the right solely granted to the defendant, and only in cases of felony or treason, to challenge, without being obliged to allege any cause, a certain number of the jury impanelled. This number is fixed at thirty-five in cases of high and petty treason; but confined to twenty in cases of murder and felony; after this, he is allowed to challenge no more, unless upon legal grounds.*

* In case a defendant persist in objecting, by a peremptory challenge, to a greater number of jurors than that prescribed by law, then, if the trial were for murder or felony, all challenges above twenty would be considered as of no effect, and his trial would proceed as if he had not made them. But in high or petty treason, he would be liable to the application of the *peine forte et dure*, a dreadful monument of times of barbarism, not yet abolished. This consisted in stretching the accused naked upon the ground in one of the prison dungeons,—his head muffled, his limbs fastened with a rope to each of the four corners of the dungeon, with a weight of iron or stone placed upon his breast, *a little heavier*, says the law, *than he can bear*. He was supplied with victuals and drink *every other day*. His food consisted in three morsels of barley or rye bread, and his drink *standing water*. He was left in this frightful situation till death came to his relief. Although this law is still in existence, and may consequently be enforced, it seems however to have been suffered to fall by degrees into desuetude; and the person accused of treason who shall challenge more than thirty-five jurors, is considered as acknowledging his guilt, and con-

The defendant has the option of making his challenges for cause, or peremptorily. It is better to begin by the former, because, in the event of a rejection of his cause as insufficient, he may then challenge the jurors peremptorily.

When there are several defendants, they are not allowed to challenge together, by way of *peremptory challenge*, a greater number of jurors than that just mentioned; and in case of their disagreeing in their challenges, they are then tried separately, and each obtains the full latitude of his right of challenge.

The second species of challenge, peculiar to criminal matters, is termed challenge for *default of the hundredors*, (for default of the inhabitants of the hundred,) and is made either *to the array*, whenever the pannel does not contain at least two inhabitants of the *hundred* or district in which the crime was committed ; or *to the polls*, whenever the jurors of the *hundred*, after being placed on the list, shall have

denmed as a matter of course, without there being any necessity for proceeding with his trial.

The punishment here mentioned by the author was termed *pressing to death*; few instances of it are found in the course of several centuries. It was the penance for standing mute, anciently inflicted *till the prisoner answered*, but altered about the fourth year of Henry VIII. when it first appears upon our books, and directed to continue *till he died*, which of course soon happened. There are some variations in the descriptions of it.—*Tr.*

made default, or whenever those nominated by the sheriff shall have been declared challengeable, on account of their not possessing in the hundred the freehold or copyhold income required by law, or for some other cause. The ground of this challenge is founded on the adage that *vicini vicinorum facta præsumuntur scire*, neighbours are presumed to be best acquainted with the affairs of neighbours.

It does not appear that grand juries are liable to be challenged.

Upon a review of all these different modes of challenging, it might seem that a jury would always be in one or other of these situations: yet this is extremely rare, so careful are the sheriffs of making their lists impartially, or of having them drawn up by the coroner, whenever they themselves feel any doubt upon their legal capacity. With respect to the jurors; it is also as rare that there should be between them and the defendant or plaintiff either of the connections prohibited by law.

When however the plaintiff or the defendant thinks he has good grounds for challenging, the court appoints two *triers*, that is, two umpires to examine into the ground of objection.

If the challenge is *to the array*, that is, to the whole list, the triers are taken either from among the attorneys, or coroners present in court. Sometimes they are selected from the

jury themselves, when the grounds of objection alleged against the sheriff have no reference to his partiality towards either of the parties, but simply to something in his own person, as his relationship to either of the parties within the degree prohibited by law.

It must now be discriminated whether it be a *principal challenge*, or a *challenge to the favour*.

In the former case, the only business of the triers is to verify the fact alleged by the challenging party.

But in the second, after ascertaining the existence of the fact, they must decide further whether it has or has not influenced the sheriff's choice.

For this purpose they hear evidence, and after the judge has summed up the proofs brought in support of the challenge, they are shut up in a room until they deliver their answer to the court. When they find the jury impartially impanelled, they write at the foot of the instrument containing the challenge, *affirmed*; in the contrary case, they write at the foot of the same instrument, *a true challenge*.

If the challenges are only *to the polls*, that is, to individual jurors, the grounds of challenge are inquired into by two of the jury already

called, and not challenged: but in case of the first juror called being challenged, two *triers* must be chosen in the manner just described; and as soon as there shall be two jurors declared by the triers wrongfully challenged, these two would then become themselves the judges of the future challenges, and the two triers would be discharged.

The triers may question the jurors challenged as to the grounds of objection against them, but no question must be put that would impeach their character: thus, they are entitled to ask if they are related to either of the parties within such a degree; if true that they have already given an opinion upon the cause, &c. &c. but they must not ask whether they have undergone any criminal conviction.

When the triers chosen by the court are themselves challenged, the court hears the grounds of objection, and appoints others, if there should be sufficient cause. It acts in the same manner when the triers cannot agree in their decision.

When, upon the declaration of the triers, the list of the jury is cancelled, the judges appoint two of the coroners present to make out a fresh one: and if the latter should happen to be cancelled for some further allegation against the coroners, the judge then appoints two per-

sons termed *elisors*, whose duty is to make out a third one. This latter is binding, and neither defendant nor plaintiff can make any individual challenge to it.

A list of the jury, and a copy of the indictment, need not, legally, be communicated to the defendant, except in the case of high or petty treason, when he must receive a copy of both, according to the express clause of the statute, ten days at least before the arraignment:

The challenges must be made by the prisoner as the jury come up to take the oath, and, as we have seen, before the oath is tendered: but this is not the system adopted in practice. As the jury list is printed some days before the session, and is communicated to the attorneys of both parties, the prisoner's attorney takes the list to his client, upon which it very seldom happens that he finds it necessary to exhaust his right of peremptory challenge. He is then satisfied with pointing out the objectionable jurors, and his attorney communicates their names to the clerk, who skips them over, so that a challenge is never or seldom made at the time of swearing in. I had not an opportunity of seeing a single one made publicly.

When the defendant is a foreigner, he has

a right to demand a jury half English, half his own countrymen, should they be found in the place, or of any other nation. The latter are not required to possess any specific income.

It may also sometimes happen, either in consequence of the challenges or of the absence of too many of the jury, that there are not sufficient to commence business and form a jury of trial; the judge in this case orders a *tales de circumstantibus*, a selection from the bystanders, that is, orders the sheriff to name other jurors in number sufficient to enable the court to begin or continue. These jurors must be taken from those present in court, having the same qualifications with those who are to be replaced. It is for this reason they are termed *tales de circumstantibus*.* The sheriff is bound then to call, preferably to all others, such persons present in court as make

* Formerly the judge ordered a simple *tales*, that is, enjoined the sheriff to produce, on such a day, in court, a certain number of jurors like those who had made default. But as this mode of proceeding caused very great delay, from its being necessary to wait till the sheriff had time to appoint and summon the new jurors, it was replaced by the *tales de circumstantibus*, which at once obviates the inconveniences of absence, and supplies the vacancies created by the challenges.

part of the general list; but if none are present,* he is authorized to select such individuals as are known to possess an income of five pounds a year, only, instead of ten. In case of dispute on the part of the latter respecting the amount of their income, they are believed on their oath, but remain liable to the consequences of perjury, in case of deception.

This procedure was very common formerly in the criminal court, the number of jurors impanelled by the sheriff being confined to twenty-four; but to avoid the *talesmen*, who constituted a jury of a condition inferior to the ordinary jurors, it became the practice to strike forty-eight; and in this way it is extremely rare that there is any necessity to recur to the expedient of the tales, and I never saw an instance of it.

When twelve names have been called, without any challenge being made by the prisoner, the crier tenders to the first juror the following oath:

“ You shall well and truly try, and true de-

* Should there, by chance, be in court some impanelled in the general jury list, and they attempt to escape to prevent being called upon by the sheriff for the service of the session, they render themselves liable to pay a fine, the amount of which is left in the judge's discretion.

“ liverance make between our sovereign lord
“ the King and the prisoner at the bar, whom
“ you shall have in charge, and a true verdict
“ give according to the evidence. So help
“ you God.”

He answers by kissing the book of the Evangelists, and each of the eleven others takes the same oath in the same manner.

The crier, turning to the spectators, then makes the following proclamation :

“ If any one can inform my lords the King’s
“ justices, the King’s attorney general or the
“ King’s serjeant,* of any crimes, felonies or
“ misdemeanors committed by the prisoner at
“ the bar, let him come forth and they shall be
“ heard, for the prisoner stands upon his deli-
“ verance; and all others who are bound by
“ recognizance to give evidence against the
“ prisoner at the bar, come forth and give
“ evidence, or else you forfeit your recog-
“ nizance.”

The clerk then says, “ Prisoner, hold up your hand : ” then turning to the jury, he addresses them in these words :

“ You of the jury, look upon the prisoner,
“ and hearken to his cause. He stands in-

* These are the counsel of the party prosecuting, who is always supposed to be acting in the King’s name. The title of serjeant expresses a degree above that of counsellor.

“dicted, &c. (reading all the indictment); upon
“this indictment he has lately been arraigned,
“and thereunto has pleaded not guilty; and
“for his trial has put himself upon God and
“his country, which country you are. Your
“charge is to inquire whether he be guilty
“of this, &c. as he stands indicted, or not
“guilty.”

The plaintiff's counsel then lays before the jury a summary of the case, which is nothing but a more detailed and circumstantial repetition of the indictment: guarding himself, however, from every sort of invective against the prisoner, and making no reflections on his depravity. Facts must speak, and the counsel is forbidden to excite feelings which must be called forth by them alone. The counsel finishes by saying that he shall call witnesses to substantiate the charges against the prisoner. This opening address very seldom lasts more than a quarter of an hour. When ended, the counsel himself calls the first witness, and questions him.

Every witness, before making his deposition, takes the following oath, which is repeated for him by the crier:

“The evidence which you shall give to the
“court and jury sworn between our sovereign
“lord the King and the prisoner at the
“bar, shall be the truth, the whole truth,

" and nothing but the truth. So help you
" God."

The prosecutor has commonly two and sometimes three counsel: the senior counsel states the case, and the witnesses are afterwards questioned by all three alternately.

After the examination of each witness by the plaintiff's counsel, the prisoner's counsel, when he has one, (the general case in the country, but very rare in London,) questions the witness, in his turn, with the view of discrediting his testimony by contradictions, or of establishing some circumstances favourable to the defendant. This is termed *cross-examination*, and is made by the judge, for the prisoner, when he has not the means of procuring counsel.

During the examination, the judge, who remains almost a stranger to what is going on, is taking notes of all the questions put to the witnesses, and of their answers, both in the examination and cross-examination. Each witness gives his evidence deliberately, pausing at the end of each sentence, to give the judge time to take his notes: the judge himself sometimes puts questions, the object of which is more to obtain an explanation of the witness's depositions, than to establish any additional circumstances against the prisoner.

At the end of each deposition, the prisoner

is told to put to the witness whatever questions he pleases.

The constable and surgeons then depose in person to the circumstances which, in France, commissaries of police and officers of health would be authorized to establish by procès-verbaux, and the objects seized are presented to the jury by those who had received them in charge from the magistrate.

The prisoner's counsel then brings forward the witnesses for the defence, to whom the crier administers the same oath as to the witnesses for the prosecution.

These witnesses may, in like manner, be cross-examined by the plaintiff's counsel.

When these examinations and cross-examinations are ended, the counsel have no right to comment on the evidence, either for or against the defendant; the jury are left, in this respect, to their own penetration, and to the impression made on their minds by the various depositions. We do not hear the prosecutor's counsel paint the prisoner as a monster of whom the earth ought to be that instant rid, and compare him to all the villains who have astonished the world by their enormities. Nor do we see the prisoner's counsel offering to the jury a thousand idle surmises on the manner in which it is possible the crime may have been com-

mitted: nor see him belying his own conscience, inducing the jury to betray their's, and threatening them with divine judgment, should they dare to do their duty. No one has the right to pervert the light of the evidence by subjecting it to the prism of his own opinion or imagination: the jury receive it in all its purity, and such as it may have been elicited by the examinations. It is for them alone to weigh it, without the aid of any extrinsic influence.

The judge then sums up the case to the jury, that is, he simply reads the notes made during the trial, without attempting to disguise their dryness by pompous reflexions, applicable or not to the subject: sometimes, when the case requires it, he remarks on the testimony adduced: but in general he confines himself to a naked statement of the affair to the jury, relying for the effect of his words, not on adventitious ornaments, but on the weight of the circumstances, on which depends the life or liberty of one of their fellow-creatures.

People assert in England, and it is repeated in France, that English judges are the defenders of the culprit: this remark, which is in every one's mouth, even of the very lowest classes, and which proves to what point the

English nation carry their confidence in the equity, lenity, and humanity of their magistrates,—this remark, however forcible in itself, is far from conveying a full idea of the real protection which the judge affords to the defendant; he treats him throughout the trial as an unfortunate being, admirably seconded in his benevolent feelings by the whole auditory, people, counsel, and jury.

Crimes, as I have already remarked, do not appear to excite in England the same horror as in France. To judge from the coolness with which they are regarded, it would seem as if the English consider them less as the consequence of a culprit's inward depravity, than as the almost indispensable result of his miserable situation, the offspring itself of chance and a bad social system. They punish them nevertheless, and often with excessive rigour: but then it is only for the sake of society, and not as the result of their indignation against the crime itself. Not thinking it however for the advantage of the public to punish every crime committed, lest the effect of example should be weakened by the frequency of executions, they reserve the full measure of their severity for the more hardened offenders, and dismiss unpunished those whose guilt is not proved by the most positive testimony.

They are indifferent whether, among the really guilty, such be convicted or acquitted : so much the worse for him against whom the proofs are too evident, so much the better for the other in whose favour there may exist some faint doubts. They look upon the former as singled out by a sort of fatality, to serve as an example to the people, and inspire them with a wholesome terror of the vengeance of the law ; the other, as a wretch whose chastisement heaven has reserved in the other world. I am far, however, from intimating, that each of the jurors reasons thus within himself : none of them, nor any of the English with whom I was in company, ever positively expressed such a sentiment, but they act as if they thought so : and their indifference, evident to the eye of every one, during the most solemn depositions ; their exactness in weighing the nature and extent of the proofs in cases where their verdict may be the least doubtful ; that possibility within themselves of forgetting transactions that may have come to their own knowledge in an irregular manner, of forgetting even the confession of the prisoner, who may have acknowledged his guilt before them, and who, at the solicitation of his counsel, or the judge, may afterwards have consented to take his chance of a trial ; or, still

more, of forgetting the declarations which he may have made under the promise of pardon * — all these circumstances prove that they are animated by a feeling approximating to that just described. The consequence is that the accused every where perceive looks of encouragement. Innocent, people pant for their liberation; guilty, they are pitied, and I will almost say their acquittal is desired. Far from an eagerness to collect, with a sort of spiteful pleasure, the proofs of the charge, every one appears intent rather upon finding out some ground of extenuation. Not only

* In our criminal courts a practice has been introduced that has something really shocking. We are in the daily habit of seeing the presiding judge, for the purposes of truth, persuading prisoners to acknowledge their guilt, promising them the indulgence of the court. The unhappy creatures are deluded by such acceptable words, and let slip an avowal which they expect is to procure their liberation, and afterwards, deceived in their hopes, find themselves condemned to the galleys, or to solitary confinement. The only advantage they derive from their confidence in the judge's promise, is to be condemned to suffer the lowest punishment prescribed by law: but most of them, if they had made no confession, must have been acquitted for default of proof. This kind of snare is odious and cruel: but let not the reader attribute it to the natural barbarity of the people: it is merely the result of that ardent desire in France to find out the truth, for which the English display so much indifference.

are they never questioned, but even stopped when about to enter on points that may prejudice their cause: the clerk, the counsel, a kindly murmur of the public, the judge himself persuades them to silence, and not to furnish weapons against themselves. One might say, that there exists in every one's breast a conspiracy against the rigour of society, against justice itself, and that all are striving to snatch one victim from its just vengeance.

To give an instance of this incredible clemency, I will describe what is daily taking place in the case of uttering, and even of forging bank-notes.

The law of England punishes with death the forging and uttering of bank-notes: but the possession of forged notes, with intent to utter, is visited by transportation only.

As it always happens that bank-notes are found in possession of the forgers, or of those who have uttered them, two bills of indictment are usually drawn up: the former, by which they are accused of forging or uttering forged notes, and the second, of having in their possession forged notes with intent to utter.

In this situation, when the prisoner is arraigned at the bar, the Bank solicitor goes to his counsel and asks if his client will plead

guilty to the second indictment, which is followed by transportation only, promising him that the Bank will renounce the prosecution upon the capital charge, in the first indictment: should the defendant agree to this proposition, he is immediately convicted of the minor charge upon his own confession: with respect to the other, the Bank solicitor informs the jury that he declines calling witnesses, and the jury consequently find a verdict of *not guilty*, in default of proof.

Let it not be thought that such an incredible transaction takes place in darkness and secrecy: no, the whole is done in open court, in presence of the public, of the judge, and the jury.

I was myself a witness at Durham of a very singular case. Among three prisoners charged with uttering forged notes, was a woman, whom no consideration, no exhortation from her counsel, or that of the Bank, nor the judge himself, could induce to give in to the proposed arrangement, and acknowledge herself guilty of an unlawful possession of forged notes. They were consequently obliged to try her for the uttering, and this being proved, she was cast for death, but the punishment was commuted to fourteen years transportation.

The following is another instance of the ex-

cessive lenity of the judges. A person named Jacob Butler was arraigned at one of the Lancaster summer assizes for robbery.

One of the most material witnesses being absent, the proof was thus rendered incomplete, (for the depositions of witnesses contained in the examination are not allowed to be read, except in the single case of the death of such witnesses). The prosecutor's counsel then sought the proof he wanted, in the examination of the prisoner before the justice of peace, which contained, as he said, a formal confession.

In this examination, the prisoner acknowledged that, being in company with two of his companions, he met a man in the street, who asked them to show him his way; that they proposed taking him to the place he wanted, and "that they lead him through "Hanover-street into an alley called *Pipe-entry*; that when there, his companions "began wrestling with the man; that *William Heap took his pocketbook*, and that afterwards they all went away together. As we were going along, he continued, Heap took "the money out of the pocketbook, and showed us the pocketbook empty; he then "threw it into a pig-stye."

The prisoner's counsel maintained, on his

side, that this declaration contained no acknowledgment of the prisoner against himself, but only against William Heap; and that consequently it ought, in no respect, to have any weight with the jury. The judge was of the same opinion, and to that effect made his summing up, and the jury, not finding the remainder of the evidence sufficient, acquitted the prisoner, notwithstanding the moral certainty of his guilt.

Such is the spirit of the English procedure, so opposite to that which animates our courts, for whom the conviction of the criminal and a knowledge of all the circumstances of the cause appear like a devouring appetite. The English seem, on the contrary, to avert their eyes that they may not perceive the truth, and it is only when, in spite of themselves, it strikes them with its full blaze of light, that they are forced to see and acknowledge it by their verdict.

There are no precise rules for what is called evidence, except those established by plain good sense: that is, it is not necessary for the jury, to enable them to return a verdict, to have any particular number or description of proofs attested by a specific number of witnesses; but without being able to determine exactly the nature of the proofs requisite for

an English jury to convict a prisoner, it may be laid down as a general position, that the verdict is never made up merely from their own conviction of his guilt, unless this conviction be in itself corroborated by some of the weightiest external circumstances, independent of the proofs resulting from the half-confessions or contradictions of the prisoner.

But when once these circumstances exist, there is no human consideration can save the prisoner, except in cases extremely favourable. The jury have sworn to decide according to the evidence, and they abide by their oath with remarkable firmness and inflexible integrity. No where is the sacredness of an oath more regarded than in England: upon this are founded all its public institutions and all transactions between man and man. The English know how to make the sacrifices which it demands.

The result of this is, that their discussions are never of long duration, because they suffer no contest to arise between their humanity and their conscience. If the *evidence* appears decisive, they give their verdict forthwith, without examining its consequences, as to which they rely upon the indulgence of the judge. If the evidence is not sufficiently strong, the judge seldom waits for the verdict,

and is the first to announce that the prisoner must be acquitted.

I saw few instances of the jury retiring to their room to deliberate; and when they did think it necessary to withdraw, they seldom remained out more than half an hour. Always, or nearly so, they gather round their foreman, and in about two or three minutes, return their verdict, which is usually in these words: *guilty* or *not guilty*.

As soon as the jury have agreed on their verdict, the clerk thus addresses them: " You " of the jury, look upon the prisoner. How " say you? Is he guilty of this, &c. of which " he stands indicted, or not guilty?" If the jury, by their foreman, answer *guilty*, the clerk records the verdict: he then says to the jury, " Hearken to your verdict as the court has re- " cored it. You say that the prisoner is " guilty of this, &c. whereof he stands in- " dicted." The foreman then replies *yes*, and the prisoner is re-conducted to prison.

This verdict of *guilty* or *not guilty*, is called *a general verdict*, because it answers to all the points presented by the indictment, and is conceived in general terms, without specifying any particular circumstances. But when the jury have any doubt on the question of criminal law, as for example, when uncertain

whether the charge laid to the prisoner is really murder, or only manslaughter, or is no crime at all according to the terms of the law, they may leave this point for the court's decision, in which case they return what is called a *special verdict*, from its specifying the particular circumstances of the charge, leaving to the judges the care of afterwards ascertaining its nature.

To return this special verdict, they begin by finding the charge proved against the prisoner, and then proceed thus: "And if, upon the "whole matter aforesaid, in form aforesaid "found, it shall seem to the aforesaid justices "that (stating the question of law upon which "the jury doubt); then the jury aforesaid find, "upon their oath, that the said defendant is "guilty of (stating the crime); but, if upon the "matter aforesaid, in form aforesaid found, it "shall seem to the aforesaid justices that " (stating the question of law upon which the "jury doubt); then the jury aforesaid find, "upon their oath, that the said defendant is "not guilty of (stating the crime.)"

The petty jury have also the right of making the same distinction in their verdict as the grand jury; but for the same reason, they use it as seldom. Thus, as occasion may require, they return a verdict conceived in these words:

Guilty not of felony, but of misdemeanor; guilty not of burglary, but of felony; guilty not of murder, but of manslaughter.

The verdict of the jury must be unanimous; but whether, owing to the examinations having smoothed the way, they have never to decide on any but such as are manifestly guilty, or that they agree to return a verdict of *guilty* on such indictments only as are established by incontestible proofs; whether, lastly, the minority makes it an act of duty to give way to the majority, this unanimity required by law is no obstacle to the promptitude of their decision. It is very rare, as I have said, that they request to withdraw to their room to deliberate; but when they do think this necessary, the clerk makes one of the officers of the court take the following oath: " You shall well and truly keep this jury without meat, drink, fire or candle; you shall not suffer any person to speak unto them, nor yourself, unless it be to ask them whether they are agreed of their verdict; until they shall be agreed of their verdict."

It is however the common practice for the judge to mitigate this excessive rigour, by permitting the jury to take some slight refreshment; but he does not wait till they have ended their deliberations, to begin a fresh

cause; and if, after the lapse of a quarter of an hour, at the farthest, they have not made up their minds, another defendant is put to the bar, a fresh jury chosen, and a new trial commenced. Should this new jury wish also to deliberate, it is locked up in another room, with the same formalities, and a third cause is called on, with a third jury, so that the business of the court is never stopped by the deliberations of the jury.

The judge has also the power, in the case of the jury not terminating their deliberation at the close of the session, to order them to be conveyed in coaches after him to the next assize-town, and when there, to have them locked up in a room until they have returned their verdict.

When the jury who have been thus locked up, have agreed on their verdict, they acquaint the judge. The cause in hand is then suspended, the defendant is fetched back from prison to which he had been conveyed, and the jury give their verdict in his presence, in the form before described: the cause which had been interrupted is then resumed.

The sentence, as I have before said, is always death, imprisonment, or transportation for a term of years, or for life; sometimes, in petty robberies, which are punished only with

imprisonment, the judge orders the prisoner, in addition, to be whipped, which is done either publicly or privately according to the sentence,

The latter is the most frequent: the number of lashes is usually left to the discretion of the under-sheriff, and is commonly from forty to eighty. It is an extremely severe punishment, to judge from the cries of the sufferer; and as the general direction of all ideas in England is to philanthropy I have heard it asserted that it ought to be abolished. It has lately been so in the case of women; but it still continues to be very frequently inflicted on men, and especially on boys, at London, and the quarter-sessions.

From the above details it will appear that the courts of England offer an aspect of impartiality and humanity, which ours, it must be acknowledged, are far from presenting to the eye of the stranger. In England, every thing breathes a spirit of lenity and mildness. The judge looks like a father in the midst of his family occupied in trying one of his children. His countenance has nothing threatening in it. According to an ancient custom, flowers are strewed upon his desk, and upon the clerk's. The sheriff and officers of the court wear each a nosegay. By a condescension sufficiently extraordinary, the judge permits his bench to

be invaded by a throng of spectators, and thus finds himself surrounded by the prettiest women of the county, the sisters, wives, or daughters of grand jurors, who have arrived for the purpose of partaking in the festivities occasioned by the assizes, and who make it a duty or a pastime to be present at the trials. They are attired in the most elegant négligé; and it is a spectacle not a little curious to see the judge's venerable head loaded with a large whig, peering amongst the youthful female heads, adorned with all the graces of nature, and set off with all the assistance of art.

Every thing among us, on the contrary, appears in hostility to the prisoner. He is often treated by the public officers with a harshness, not to say cruelty, at which an Englishman would shudder. Even our presiding judges, instead of showing that concern for the prisoner to which the latter might appear entitled from the character of impartiality in the functions of a judge, whose duty is to direct the examinations and to establish the indictment, too often become a party against the prisoner, and would seem sometimes to think it less a duty than an honour to procure his conviction.

It is true that the liberty of defence, very differently understood in France from what it

is in England, forces us to a much more rigorous prosecution; it would be almost impossible to convict a prisoner, considering the latitude which our laws give to the defence, were the prosecution confined within the limits prescribed in England, that is, were it forbidden to question the prisoner and his accomplices.

Another consequence of this constitution of the English courts is, that they by no means present the same dramatic interest as ours. In England, the defendant acts no kind of part: his hat stuck on a pole might without inconvenience be his substitute at the trial. Public interest is not excited by the countenance of the prisoner, who is placed with his back to the spectators; nor by the unfolding of the proofs, nor by the prisoner's resistance; nor by the judge's exertions to discover the truth. There is no contest between the plaintiff and defendant; and the latter never offers any thing more than the spectacle of a man who seems careless about the issue of the trial, and leaves his life to be disputed between the prosecutor's counsel and his own. Neither the sound of his voice becoming more faint and tremulous with the accumulating mass of proofs against him; nor the still increasing ghastliness of his countenance, nor the sweat which

stands upon his forehead, nor the convincing silence of guilt, laid bare and forced to yield, call forth the passions of the by-standers, and summon from their hearts pity, horror, vengeance, and all those vehement feelings produced by our trials. In England, all is calm and tranquil: counsel, jury, judges, the public, nay the prisoner himself, whom no one prizes of his danger, and the overwhelming strength of the evidence.

Judgment is not pronounced, as in France, directly after the verdict of the jury, except in cases of murder. When the jury have returned their verdict, the prisoner is taken away, and it is not till the session is over that all the sentences are pronounced collectively. All those who are condemned to the same punishment are included in one and the same sentence.

This moment, it must be allowed, presents a very painful scene. Most of the convictions, as I have said above, are capital ones; commuted afterwards into a certain number of years of transportation, or imprisonment. Almost all the prisoners know therefore beforehand, nearly for a certainty, according to the circumstances of their case, the extent of their indulgence. The judge, however, who in all cases is obliged to pronounce the sen-

tence of the law, puts on a small black cap, assumes a melancholy and awful sadness in his countenance, and makes a solemn address to the prisoners, pointing out the enormity of their guilt, and the necessity he is under, by their death, of ridding society of their depravity. He then passes the fatal sentence: but the solemn pomp, the address, the sentence even, are far from making that impression on the prisoners that might be expected; they remain impassible to these empty denunciations, and their daring looks seem almost a defiance to the judge to proceed forthwith to execution.

When the verdict of the jury appears to the court contrary to the evidence, it must be discriminated whether it be for or against the prisoner.

In the first instance, the judge may make a fresh summing up to the jury, and exhort them to examine the case with more attention, and to alter their verdict: but should the jury persist in adhering to it, the judge is obliged to acquit the prisoner, unless he suppose bad faith or corruption to exist on the part of some of the jurors. He may then suspend the acquittal, and report the matter to the King, who orders the prosecution of the whole jury, or the accused juror, by way of *attaint*: and if,

upon this prosecution, which is conducted like every other, the jury or some of them are found guilty, the verdict is set aside, and the prisoner brought before a fresh jury. But with the exception of these extraordinary cases, no opposition can be made to the discharge of the prisoner, according to the maxim laid down among all nations, *non bis in idem, not twice for the same crime.*

In the second instance, after the judge has exhorted the jury to alter their verdict, he is obliged to pass sentence upon the prisoner according to law, but he has the power of granting a reprieve; and upon his return to London, he lays a statement of the case before the twelve judges, to whom he communicates his notes taken during the trial; and if the twelve judges should be of opinion that a verdict has really been returned contrary to the evidence, they make their report to the King, from whom the prisoner receives a full pardon.

But such instances are of very rare occurrence: the former, because no judge would ever obstinately persist in procuring the conviction of a prisoner, even were he guilty; and the second, from its being still more difficult to suppose that the jury, in the face of the judge's opinion, and of the natural bearing of the cross-examinations, should per-

severe in finding the prisoner guilty; and from its often happening, moreover, when the evidence does not appear sufficient to the judge, that he persuades the plaintiff's counsel at once to give up the prosecution, to which the latter never fails to consent: so that the jury, after the indictment has been read, pronounce *not guilty*, in default of a prosecuting party.

There is no court of cassation in England: and the following is what may be considered as approximating the most nearly to our procedure in this respect.

It will have been, perhaps, already remarked, after the formalities of the examination, of which I have given an account, that it would be extremely difficult, to find what we term, grounds for quashing a sentence, (*moyens de cassation.*)

The examination which precedes the trial is reduced to a simple questioning of the plaintiff and his witnesses before the magistrate, who, according to his opinion of the case, and upon his own responsibility, may discharge the prisoner, or commit him to prison till the assizes or quarter-sessions, where he undergoes his trial, if the bill of indictment presented against him is found by the grand jury.

Should the magistrate conceive the com-

plaint too slight, and will neither commit the prisoner nor hold him to bail to appear at the assizes, the plaintiff, in such a stage of the business, would have the power of going himself before the grand jury, with his bill of indictment and his witnesses, and require a *true bill*. If the grand jury think there are grounds for granting it, the prisoner is arrested and tried; and in the event of its not being possible to seize his person, the judge issues against him a warrant, under which he is arrested, and tried at the assizes following his apprehension.

With respect to the trial, there is no sort of certified statement of the transactions, every thing being left to the judge's prudence; the care of hearing the witnesses, of seeing the oath administered to them, and the power of granting or refusing requests made to him by the prosecutor or defendant.

There are then but four heads under which the proceedings may be quashed, flowing from the essence itself of all criminal procedure: first, when the indictment is not in the exact terms of the law; secondly, when the crime imputed to the prisoner is one not foreseen by the law; thirdly, when the penalty pronounced by the judge is not that which the law has applied to the crime; and fourthly,

when some part of the trial has been conducted illegally, as, for instance, if, after the sentence has been passed, it shall be discovered that all the witnesses, instead of swearing upon the Bible, have been sworn by chance upon a volume of Shakspeare.

In the first case, if the defendant objects, with any show of justice, to the form of the indictment, the prosecutor withdraws it and procures another more regular, which he presents forthwith to the grand jury.

In the second, if the crime imputed to the prisoner, is not that which the law has foreseen, he may then either make an objection to the indictment, which is termed *demurring to the indictment*, or undergo his trial upon the facts imputed to him, and afterwards put in a plea before the jury return their verdict, that the alleged charge is not considered as a crime in law, for instance, not constituting treason or felony.

If he adopts the first course, that is, demurs to the indictment, he must begin by acknowledging himself guilty of the fact laid to his charge, maintaining that it is no crime in law, and then the judge decides the question of law, and pronounces sentence accordingly.

But if the prisoner is unwilling to run the risk of acknowledging himself guilty, he lets

the trial take its ordinary course, and after the verdict of the jury upon the question of fact, he then puts in his plea upon the point of law before the judge.

Should the judge hesitate, he abstains from giving his own opinion, but reserves the decision of the question for the twelve assembled judges.

But should the question appear sufficiently clear to warrant his decision, he gives judgment against the defendant; or, in the third case, before-mentioned, of a doubt upon the application of punishment, should he pronounce upon the defendant a punishment which the latter may think excessive; then the prisoner's counsel, with one or two of his brethren, wait upon the judge after the trial, protest against the sentence, and acquaint him with their intention of appealing to the court of King's Bench, the high criminal court of England, by soliciting a *writ of error* against the decision. These writs are granted by the Attorney-general, and must never be refused. They correspond nearly with our acts of appeal, with the exception of their not being suspensive.

The judge, however, by this declaration, is by no means shackled in the exercise of his power; he is at liberty either to respite the

judgment until a decision has taken place in the King's Bench, or to have it enforced upon his own responsibility, without regard to the remonstrances made to him: but who, in England, would dare to take upon himself the onus of such a responsibility?

Yet such an occurrence happened to one of the present twelve judges in a capital case: fortunately for the prisoner, and also for the judge, a respite was obtained from the secretary of state's office, before the execution of the sentence, by one of the prisoner's friends, who reached the place of execution just as the prisoner was about to be hanged. The circumstances adduced by the prisoner in his defence, which were not satisfactorily proved at the trial, being afterwards investigated, and found correct, the prisoner obtained the King's pardon: if unfortunately he had been executed, and his innocence had been made clear after his death, the judge might have been impeached in parliament, and his dismissal required of the King by the House of Commons, upon the ground of ignorance and incapacity.

Finally, in the fourth case, of an asserted illegality in the process of the trial, the court of King's Bench at first examines if the alleged circumstance is of a nature, in the event of its being proved, to vitiate the proceedings; and

if so, it is sent to be inquired into by a jury, always selected in the county, and, if the allegation is proved, the sentence is annulled.

All the cases are pleaded in the court of King's Bench by the counsel of the two parties, in the same manner as in our own courts. When the pleadings are finished, the judge who tried the cause, reads his notes to his brother judges, and explains the motives of his decision: the judges then decide the question by giving their opinion *openly and publicly*; and according as the nullity affects the verdict, as when the witnesses swore falsely, or did not swear at all; or as the nullity affects only the punishment pronounced by the judge, they set aside the verdict and send the prisoner to another assize to be there tried; or they rectify the punishment illegally pronounced by the judge, and apply the penalty appointed by law.

I cannot refrain, on this occasion, from remarking on the difference in the genius of the English people from ours. It is only under the influence of fear that we in France dare perform our duties as magistrates and citizens; we exercise our political rights in the dark; and our electors and representatives vote only with closed ballots. It is quite the reverse in England, where the courage of the citizen is in

nothing inferior to that of the soldier: every one there fearlessly takes upon himself the responsibility of all he does, whether a private individual or public functionary: the judges deliberate and give their decision in open court; the jury, obliged to be unanimous in their verdict, necessarily make known their individual opinion in each case; their electors give their votes in public to their chosen candidate; and upon all important questions, their members of parliament proceed by a call by name. In this manner, the abilities, opinions, and intentions of all are ascertained, and estimated at their proper value, affording means of knowing who is to be esteemed or feared, supported or rejected.

The court of King's Bench is one of the three great courts of England: it consists of a presiding judge, termed *lord chief justice*, and of three puisne judges: the same is the case in the *Common Pleas*, and *Exchequer*. The united judges of these three courts constitute the twelve judges of England, whose duty is to hear and determine all pleas of the kingdom, civil and criminal, as well as all suits between government and persons accountable to them, and of the latter among themselves.

All these courts, between the circuits, before mentioned, hold sessions called *terms*, respect-

ing which I shall give more circumstantial details in the following chapter. At sessions of this nature, of the court of King's Bench, are pleaded and decided, in the manner just explained, the requests of *cassation** in criminal matters.

Such are the chief observations I have been able to collect upon the criminal procedure. With respect to the civil, which formed an inferior branch of my researches, but concerning which I likewise endeavoured to obtain some information, it appeared to me in general sufficiently simple, with the exception of that of the *Chancery* court, which seemed inextricable. But the short stay I made in England prevents me from giving full particulars on all the subjects embraced in the civil procedure, and on all the laws applicable to their decisions.

I am enabled, therefore, to present only an outline of the manner in which ordinary cases are conducted, and this will form the subject of the following chapter.

* That is, motions for setting aside verdicts.—*T.*

CHAPTER IV.

SKETCH OF THE CIVIL PROCEDURE.

ALL civil suits in England are by original writ brought before one of the three great courts of the kingdom, the King's Bench, Common Pleas, or Exchequer.

The competency of these three courts is fixed only in a general manner, and it is easy, by means of fictions, to bring all causes within the province of one of them.

There is besides no peculiar advantage in bringing a cause into one court rather than another, still less than in any particular chamber of our royal courts. The usual motive for preferring one court to another consists in having a cause tried in some determined spot, or by judges having a particular jurisdiction, and applying different laws, such as judges of our courts of commerce; but the three courts I am here speaking of, are composed of judges who have the same powers; follow the same procedure, judge in the same place, and according to the same laws.

The point of difference in their jurisdiction appears to have in view rather the classification and order of suits than any other object.

Thus, the court of King's Bench, besides criminal cases, is especially charged with all civil personal suits.

The Common Pleas, with civil real suits.

In the Exchequer, are handled all causes touching the revenue; between government and those accountable to them; and between the latter among themselves.

After the original writs mentioned above, the court before which the suit is brought, issues a writ of *venire facias*, that is, an injunction to the sheriff of the county in which the suit arises, *to bring before the court* the number of jurors necessary to try the matter. Upon this writ the sheriff sends to the court a list of jurors, whom he is supposed to have summoned to appear before it, and of which the parties to the suit may take cognizance to prepare their challenges, which are made in the manner before pointed out. The court then issues a notice declaring that on such a day, at such an hour, the suit will be tried before it, *nisi prius, unless before* this time one of the King's judges shall arrive in the county where the subject of dispute has arisen, in which case the suit shall be tried by this judge.

It is in this manner, and because the day fixed by the court for trying the cause, is always much posterior to that of the judge's circuit, and that consequently the case foreseen by the court is always realised, that the judges of assize find themselves invested with the determination of all the civil suits of each county, and this is also the reason why the civil side of the courts of assize, called the *court of civil pleas*, is likewise called *court of nisi prius*. This form of proceeding was adopted by the judges to save parties the enormous expenses incurred by them in bringing up their witnesses ; and especially to spare juries the trouble and expense attendant upon their being obliged to come to London for the purpose of there deciding the suits of their respective counties.

By means of this ingenious contrivance, the courts of England preserve their general jurisdiction over the whole kingdom, and all suits are thus tried in the county in which they originate.

However, in cases of great pecuniary interest, or difficult solution, the court before which the cause is brought, has the power, upon demand of the parties, to reserve it for its especial examination, with the co-operation of a jury chosen in the county where the suit

arose.. Trials of this kind are called *trials at bar*, and they are granted by the courts sometimes when one of the twelve judges, or an officer of the court, or even a counsel is party to the suit; but in ordinary cases, the usual form of proceeding is that which I have just mentioned.

The process in civil suits in the assize courts is conducted exactly in the same manner as in criminal ones, with the exception of there being no grand jury, and of their coming direct before the petty jury.

But in order to spare the latter the perplexity of nicely discriminating among the numerous demands of the parties, and the still greater difficulty of forming their verdict so as to contain in a lucid and distinct form, the points admitted or rejected, it has been wisely established that, whatever might be the nature of the case, the plaintiff's plea shall always be confined to a demand of an equivalent recompense. So that the literal performance of a bargain is not required, but merely an equivalent for the loss consequent on a failure in executing it. Thus a vendor may not be compelled to deliver the article sold; he is only liable to an action, to indemnify the purchaser for what he had engaged to furnish.

In this way the answer of the jury is as simple in civil as in criminal suits; and as in a cri-

riminal process the verdict is expressed by a single word, *guilty* or *not guilty*, so in a civil one it is returned in a like manner, by saying, *for the plaintiff*, or *for the defendant*. When the verdict is in favour of the latter, the plaintiff is nonsuited, and condemned as a matter of course, to pay the costs: when, on the contrary, it is in favour of the plaintiff, the jury at the same time assess the quantum of damages. In the latter case the defendant pays the costs; although it happens sometimes, as with us, that they are apportioned between the parties. Thus then, at the opening of the assizes, when one of the judges proceeds to the criminal court, the other proceeds with the same ceremony, to the civil court.

The number of the jurors is nearly from sixty to seventy: they are chosen, challenged, balloted, and sworn in the same manner as on the criminal side. In like manner too, when once in the jury-box, should no challenges be made, they try all the cases brought before them during the morning. It is a matter of astonishment to see how smoothly the whole machine moves on. Their verdicts must also be unanimous, and in case of disagreement, they are likewise locked up in their room, until they are all of the same opinion; and a fresh case is called on, with a fresh jury, as in the criminal court.

In important cases, the parties may have an understanding between them, and request from the court in which the suit originated, an order for having it tried by a special jury. This order is always granted upon the request of the two parties, or by either of them. In the former case, the expenses are borne jointly between them; in the second, by the party desiring the special jury. These expenses are a guinea to each of the jury, paid to them in court. The following is the manner in which special juries are nominated.

In each of the courts, King's Bench, Common Pleas and Exchequer, is an *office*, to which the sheriffs are bound to transmit yearly a list of all freeholders in their counties, that is, of every person possessing a freehold, and in the enjoyment of the greatest property. They are almost always baronets, knights, or at least esquires, except in London, where they are mostly opulent merchants or bankers, having also the title of esquire.

The two parties proceed in person, or by their attorneys, to the *master of the office*, to be present at the selection which it is his duty to make, in the freeholders' book, of eight-and-forty persons, out of those put down in the list. Each party is at liberty to strike, or the master of the office strikes out for the absent

party, twelve of those antecedently chosen; and the twenty-four remaining names are sent to the sheriff of the county to make out the special jury list, and this, at the trial in the *assi prius* court, is again reduced to twelve, by ballot, to form the jury of trial.

If, from the challenges made by the parties in the court, or from default of appearance of the jurors summoned, who are not obliged to attend, the special jury should be reduced to less than twelve, the number is completed by ordinary jurors of the session.

Such is the mode practised in the nomination of special jurors in civil cases: I ought to add that, in criminal affairs, where the subject is neither felony nor treason, but merely a misdemeanor, the prisoner, and even the prosecutor, has the power of making application to the court of King's Bench for a special jury, and this jury, which must not be refused, is chosen, reduced, and completed in the manner just pointed out. It must be observed, however, that, in this case, special jurors may never be challenged except for legal cause, and never peremptorily, the power of doing this being considered destroyed by the obligation binding on both parties, when the list is made out, of rejecting, as I have already said, twelve of the forty-eight names selected by the

master of the office. It is for this reason that a special jury is never granted to those arraigned for felony or treason, because, in these high crimes and misdemeanors, the accused must not be deprived of the smallest part of his right of challenge, this right, too, being incapable of uniting either with the small number of special jurors, or with the particular mode of challenging them.

The case is conducted before the jury, whether ordinary or special, like cases in the criminal court: the investigation of the suit is carried on both upon written documents, and oral testimony, to the latter of which the English attach a much greater importance than we do, on account of the regard which the witnesses have to the sanctity of an oath.

The plaintiff's and defendant's witnesses are questioned and cross-questioned by their respective counsel, who are often three in number, and always two, at least, after the senior one of either party, in a short opening speech, has explained the nature of the case, and pleaded legally the grounds of action.

The judge afterwards sums up the case, pointing out and explaining to the jury the proofs which, on the question of fact, ought to have most weight in their decision, and informing them in what way the question of law is

disposed of. After this summing up, the jury return, unanimously, a general or special verdict, as explained above.

The jury thus *decide de facto*, in civil and criminal process, both upon the question of fact and of law, with this difference relatively to each of these questions, that in the former, they follow no guide but the light of natural reason, and in the latter, confide almost always in the direction of the judge, although, as we have seen, they are not compelled to do so.

But upon all occasions of their not following it, the party who has lost his cause may make application to that of the three courts which sent the cause to *nisi prius*; and the latter seldom refuses, in such case, to grant a new trial.

There lies also ground for a new trial, whenever either party alleges that the judge misdirected the jury upon the question of law; or when the jury have given a verdict upon the fact contrary to the evidence; and generally speaking for all causes admitted by us as grounds of a civil request, such as deceit, or the discovery of fresh documents: to which must be added, tampering with the jury; an infringement by the latter of the rigorous laws prescribed for the performance of their duties;

the absence of a material witness, whom it was not possible to produce in time; or excessive damages.

Should the jury have been unwilling to decide the question of law, and have adopted the judge's opinion in returning a *special verdict*; the party aggrieved is at liberty to take out a *writ of error*, which is obtained in the manner before explained: and the judgment would then be brought for trial before the court which sent the cause to *nisi prius*, so that, in every case, a remedy is provided against the first verdict, if erroneous, either through the medium of a new trial, when the jury have taken upon themselves to decide the question of law; or of *writs of error*, when they have followed the direction of the judge.

When two parties agree on the question of fact, and differ only on that of law, they are at liberty to frame a *special case*, that is, to draw up, in concert, the circumstances of the fact, and then submit the question of law to that one of the three courts having jurisdiction of the suit.

All these various proceedings, demands for *new trials*, judgment on *writs of error*, and *special cases*, take place at the *Terms*, that is, at the sessions held by each of the great

courts, four times a year, in the interval of the circuits, and begin as follows:

The first, on the 6th of November to the 28th; the second, the 23d of January to the 12th of February; the third, fifteen days after Easter; and the fourth, six days after Trinity. The two latter last each about a month.

In these courts, causes are tried upon the pleadings of counsel, exactly in the same manner as civil suits are tried in the French courts, and they occupy, in the intervals of the circuits, all those barristers who live in London.

These three courts are besides courts of appeal, one from the other, in a prescribed order; and their verdicts, moreover, are subject, in like manner, to a revision by the House of Lords, the sovereign court of the whole kingdom. It is extremely rare, however, to find suitors sufficiently obstinate to have recourse to this last remedy, which is always accompanied with an enormous expense. But in questions of extraordinary difficulty and doubt, and when the authority of a verdict in the courts below does not exclude all hope of a reversal, the case is brought before the House of Lords, and pleaded before the Lord Chancellor and a very small number of peers, (sometimes only two,) who may think proper to

attend.* The House of Lords is legally competent for business, when there are present only a bishop, a peer, and the Chancellor. In such occurrences, it often happens that the peers order the attendance of the twelve judges, to hear the pleadings and give their advice. It is very seldom that their opinion is not adopted by the House.

It will doubtless be a subject of astonishment to see the House of Lords, composed, it is true, of the most eminent and dignified personages, but whom no necessity compels to give their attention to the especial study of jurisprudence, invested with the important privilege of pronouncing, in last resort, upon the most difficult questions of law, and of reversing judgments pronounced by the most learned lawyers of the kingdom: but this wonder would cease, if the reader could enter into the essential spirit of the administration of English justice, namely, of ensuring above all *an entire impartiality in the judge, and of preferring this to knowledge itself.*†

* See some curious, not to say ludicrous, particulars on this subject, in a recent pamphlet by Mr. M. A. Taylor.—*Egerton, Charing Cross.—Tr.*

† Are the members of the House of Lords, say authors, in general better judges in points of law, than the judges? Unquestionably not: yet the law has said that the majo-

It is this same consideration which has conferred upon the jury the power of deciding upon all questions of the suit, whether of fact or law, and which has taken from the judges the right of resolving them, unless upon a request from the jury, when they think fit to return only a *special verdict*; or upon that of the parties, when they agree to frame a *special case*.

There is no country in which the judges are more esteemed or respected than in England; all of them enjoy the greatest reputation for learning and impartiality: but the English are generally persuaded that the system of government in appointing to these important offices none but such as are worthy of them by their high qualifications, proceeds solely from the situation in which the judges are placed, and of the peculiar nature of their functions, which are limited to serve as guides to the jury. They are convinced that if ever any encroachment

rity of that house, though comparatively illiterate with respect to law, may reverse every judgment of the judges that is regularly brought before them to be revised, and this, even the judges are unanimous upon the subject. Why, then, has the constitution made such men, even upon such questions, superior to the judges?—Because the constitution, though it values great learning much, values great impartiality resulting from independence, more.

should be made on the rights of the latter, and if, as the result of such encroachment, the life, liberty, and property of the subject should be at the mercy of judges appointed by the crown, it would become the interest of ministers to select wicked men as tools in the participation of their private resentment, or in their designs against public liberty; and once more might courts of justice be occupied by men like Jefferies—whereas, under the existing system, such an offensive perversion can never happen.

There is a further cause for strengthening still more this primary motive for conferring on the jury the integral part of the judicial power. This is, that as it appeared to the legislature to constitute the essence of a representative government that the people should be bound only by laws made by themselves through the medium of their representatives, so in like manner it occurred to them that these laws could be interpreted best by the people, who are nothing else than the jury, as is expressed in the form of their oath, where it is said, *that the jury are themselves the people: which country you are.*

Such is the spirit of legislation, and such the source of the immense powers accorded to the jury: but let it not escape us in what manner

the courts, by means of *new trials*, have rendered themselves arbiters in the decision of questions of law, and thus afford a check to abuses that might arise from the frequent ignorance of jurors, and from the almost excessive confidence which the law has placed in their good sense.

I had forgot, also, to mention that a great number of causes are amicably settled during the sitting of the assizes, and particularly when they draw to a termination; the parties fearing lest their cause may not be called on, and be thus put off to the next session, that is, six months afterwards.

Many causes are also, by consent of parties, submitted to the arbitration of a barrister, who receives power from the parties, of deciding, in last resort, upon the question both of fact and law.

This barrister then takes a spacious room in an inn, and the process is carried on * before him exactly in the same manner as before the judges and jury. His fees are about ten guineas a day, rather more than less. I saw a case at Lancaster thus referred to the arbitration of one of my friends, a young man yet in the

* In London, usually at the barrister's chambers, in one of the Inns of court.—*Tr.*

outset of his career. The question turned on a right of fishery: there were about a hundred and fifty witnesses to examine, and it was supposed the cause would last ten days, for which he was allowed a hundred and fifty guineas...

Besides the three great courts before-mentioned, there is also a fourth one, not less important than the other three, consisting of the Lord Chancellor alone, and of a few officers appointed to forward the examination of the suits. This court, called the *Court of Chancery*, is more especially charged with all suits concerning minors, lunatics, and bankrupts: but another object of its establishment is, in its quality as a *court of equity*, to render assistance to a debtor, when there are two concurrent actions carrying on against him at the same time, without having constituted the object of a special clause in the contract: as when his creditor, holding a mortgage on his estate, and at liberty to follow up the sale of it, proceeds against him by arrest.

Another object is to give creditors the means of obtaining the literal execution of their contract, which they could not obtain in the ordinary courts, as I have explained. Thus a creditor has two ways of prosecuting his debtor, either in the ordinary courts, if he is satisfied with gaining a verdict of damages;

or in the Chancery court, if he wishes to compel him to perform his undertaking in kind. But so perplexed, so tedious, and so long is a Chancery suit, that it rarely occurs that people willingly prosecute an action in this court. I had no time to penetrate all its dark mazes, and I prefer being silent on this subject, rather than expose myself to the risk of giving uncertain information.

There are several other courts, respecting which I had no opportunity of procuring positive information ; these are the ecclesiastical courts, for the decision of civil causes of a mixed nature, such as disputes concerning wills, and marriage-contracts ; and the court of admiralty, which takes cognizance of all actions for damages in causes arising on board-ship, in harbours, and certain large rivers.

But generally speaking, all these particular courts are looked upon in England with an unfavourable eye. They are considered as the rude remnants of feudal government, and as exceptions, to be deplored, to the ordinary mode of trial by jury, esteemed by Englishmen of every class and opinion, as the palladium of their liberties. “ All our institutions,” says one of their writers, “ our most wise and useful laws have been successively attacked by ministerial despotism. All the outworks of

“ our constitution have been several times
“ thrown down by the efforts and artifices of
“ the enemies of freedom: they have pene-
“ trated even to the foot of the ramparts raised
“ by our ancestors for the protection of our
“ rights: one single fortress held out, and has
“ continued, from age to age, to stand erect in
“ the midst of the storm, inaccessible to hidden
“ as well as to open attacks. If England is
“ still a free nation, if, above all the states of
“ Europe, she is rich and flourishing, she owes
“ these benefits to *that true citadel of the*
“ *people, to that impregnable Gibraltar of*
“ *the English constitution*, the trial by jury,
“ which every Englishman should defend to
“ his last breath.”

Such are the sentiments professed by the whole nation, and which every child breathes with the air in which he draws his life. Nor must it be thought that these protecting maxims are proclaimed merely by individuals born in obscurity, who seek for shelter against a tyranny more particularly aimed against themselves: far otherwise: the dignified nobility, peers, judges, and the most distinguished public writers, conceive it an honour to maintain them, and hand them down unimpaired to future generations.

Blackstone, one of the great judges of Eng-

land, expresses himself in the following manner upon the trial by jury: "We have," he says, "explained at length the excellence of this mode of trial, in civil cases; but it possesses a still greater advantage in criminal cases, in times of trouble and danger, when there is more to be feared from the violence and partiality of the judges appointed by the crown, than in litigations about the boundaries of neighbouring estates. Our laws have therefore wisely and mercifully placed this twofold barrier of a presentment and trial by jury, between the liberties of the people and the prerogatives of the crown. To preserve the admirable balance of our constitution, it was necessary to place the executive power in the hands of the sovereign: but this very power might have become dangerous to the constitution, had it been exercised without control by judges appointed, for a time, by the crown, who, in this case, *like those of France or Turkey*, might have condemned to death, imprisonment, or exile, every man who gave umbrage to government, contenting themselves merely with the declaration, *that such was their good pleasure*. The founders of the laws of England, on the contrary, have, with excellent forecast, provided that no one shall be called to answer a capital

“ charge brought by the crown,* unless on the
“ preparatory accusation of twelve or more of
“ his fellow subjects, the grand jury, which is
“ afterwards submitted to twelve of his equals
“ and neighbours, *selected indifferently*, and
“ superior to all suspicion. So that the liber-
“ ties of England cannot but subsist so long
“ as this palladium remains sacred and invio-
“ late, and so long as we resolve to defend it
“ not only from all open assaults, which no
“ one can be supposed sufficiently daring to
“ direct against it, but from all machinations
“ planned secretly for its destruction.”

Such is the vigorous and convincing style in which the most distinguished personages of England deliver their opinions upon the institutions forming the basis of public freedom: for in that happy country, where this very freedom constitutes the delight and glory of all classes of society, the great are no less proud of its blessings than the meanest of the people.

* It must not be forgotten that all criminal actions, although prosecuted by private individuals, are supposed to be in the King's name; and that almost all acts, which we term *crimes*, are punished capitally.

CHAPTER V.

OF THE JUDGES, AND COUNSEL.

ALTHOUGH it forms no part of my plan to describe the manners of the various classes of the English nation, it yet appears to me not altogether useless to enter somewhat at large into the mode of life and situation of the judges and counsel during the circuits, with the view of completing the picture formed by the reader of the administration of justice in England.

In this country, there is no family, as in France, exclusively set apart for the magistracy: no father can educate his son in the certainty of one day seeing him invested with the judicial office. The nine judges, who, together with the chief justices and baron of the three courts, as well as the chancellor and vice-chancellor, compose the whole magistracy of England, are selected from among the barristers. The chief justices are usually taken from the more distinguished counsel of each of the six circuits, and the other judges from those of a secondary rank. Upon the death

of a chief justice, it is very rare that his vacant place is given to one of the judges of his own court, or either of the other two: so cautious are the English against weakening the impartiality of justice, which might seem endangered were the judges supposed dependent upon the crown, by the hope of promotion: the practice is to raise to the dignity of chief justice a barrister of the first eminence, and the one generally marked by public opinion, as being the most capable.

But the first condition exacted by ministers is an accordance of his political opinions with theirs: on this point they are inflexible: no ability, reputation, or consideration whatever, can move them from this rule. They would rather make a junior judge chief justice, at the risk of raising against them all the partizans of judicial independence, than bestow the dignity upon a member of opposition. It is even very doubtful if the latter would accept it, in the apprehension of destroying his credit with his own party, and of his being thought to have sold his conscience to ministers.

An occurrence of the above kind lately happened on the death of Lord Ellenborough, lord chief justice of the court of King's Bench. The public voice pointed out as his successor one of the most distinguished pleaders at the

English bar; but his well known political opinion prevented ministers from offering him the situation, and they preferred giving it to Mr. Justice Abbot, notwithstanding the opposition of such a promotion to all established practice.

The judges have an income of about £4000 a year, and receive, in addition, as I have been assured, the sum of 4 or £500 more to defray their travelling expenses. They possess, as I have before said, a great regard in the eyes of the people, and a high consideration with persons of the upper classes of the state; they are received in the circuits with especial marks of distinction; the greatest noblemen esteem it a duty to honour them: and yet the situation is but moderately courted. It is considered as too slightly paid, and ministers often experience a difficulty in filling it. At the time of the promotion of Mr. Abbot, just mentioned, ministers in vain offered his vacant place to Mr. Richardson and Mr. Littledale, barristers of the northern circuit, conspicuous for their learning and unimpeachable integrity: they both preferred keeping to their private practice; and it was not till after repeated and most urgent solicitations that Mr. Richardson at last yielded to the wishes of government.

The profession of the bar is in much higher estimation in England than in France. It not only brings in a greater income, but opens to its followers a vast field of action in which a thousand examples of success stimulate them to the hope of advancement. There is no object, however elevated, to which their ambition may not aspire. The great departments of the state, the peerage, the representation in the House of Commons, the situations of Chancellor, of speaker, of lord chief justice, of judges, &c. are the almost sure reward of reputation at the bar: and they receive by anticipation, in some measure, the honour bestowed on the dignified situations to which they are the presumed successors. In the circuits they are received with the highest respect, and experience almost as many marks of deference as the judges themselves.

In each county there is a certain number of great personages in the ordinary practice of performing, at assize time, the honours of the shire to the judges and counsel. They usually give them a grand dinner, either in the town, if they have a convenient residence there, as the Bishop of Durham, for instance, or more commonly on their estates, as the Archbishop of York, Lord Lonsdale, and most of the other great noblemen. All the counsel, without ex-

ception, are invited to this kind of festival, and take their seats at table, each in the order of his reception at the bar: their kind host is decorated with all his orders, and to grace the occasion, exhibits every where the most sumptuous magnificence.

The judges also give the counsel a dinner in each assize town, and treat them in general like friends and brothers. They know that most of them may one day become their colleagues, and some of them perhaps their superiors.

None but young men of the wealthiest families can embrace the profession of the bar, on account of the great expenses incurred at first starting. There are two circuits, as we have seen, every year, and neither of them stands counsel in less than a hundred guineas during its six weeks continuance, for maintenance, travelling costs from one assize town to the other, and expenses for private apartments, which they are obliged to have in each town, their professional dignity not permitting them to descend to an inn. At London, besides a house for themselves and families, they must have chambers in one of the piles of buildings called *inns of court*,* where they may be con-

* These are four in number, Lincoln's Inn, Gray's Inn, the Middle Temple, and Inner Temple.

sulted by attorneys and their clients. These chambers, consisting at most of two or three rooms, stand them in from fifty to seventy pounds a year. They must have besides a sort of clerk, who officiates as servant; so that their dignity cannot be kept up with less than six or nine hundred a year. Several years may pass away without producing any profit from their profession, seeking some lucky opportunity to signalize themselves, and waiting until the promotion, retirement, or death of one of their more prosperous brethren may enable them to drop in for a share of his lucrative practice.

They consider themselves fortunate, if, at the end of five or six years, they succeed in covering their expenses: soon afterwards they gain from 1,000 to 1,500 guineas, then 2,000, 4,000, 6,000 and sometimes 12,000. Sir Samuel Romilly was in the receipt of from 15,000 to £16,000 a year.

Those who embrace the profession are generally the younger sons of rich landholders, bishops, barristers, bankers and merchants, sometimes too the younger sons of peers. Their information is not confined to professional knowledge. Summoned to the highest departments of administration, they study attentively their history, their constitution, the

various rights which it gives to all classes of society, and the political state of their country, both domestic and foreign. Almost all know the French language, and some, the Italian. Scarcely a single one but has travelled through France, Switzerland, Italy and Germany, and has some acquaintance with the customs and form of government of these different countries. As soon as the summer assizes are ended, which is about the middle of August, they all depart, like swallows on the approach of winter, for our regions, seeking new customs, a new sun, unknown pleasures ; * and, from the still existing imperfection of our institutions, deriving fresh motives for national pride and love of their country.†

In their intercourse with one another, they act like brothers, and know no rivalry but that of talent. They would blush at raising themselves by any other means, or at giving the slightest intimation to an attorney for business.

* These excursions last about eight or ten weeks, and fill up the interval between the termination of the circuits, and the 6th of November, when term begins.

† One would almost suppose the author had his eye here on a fine passage in one of the Edinburgh Reviews, that an acquaintance with foreign institutions and a residence in other countries, tend only to make a man more intensely patriotic.—*Tr.*

so adverse to the adoption of changes proposed in the constitution. That body knows as well as any one how specious those alterations are; but is always checked by the fear lest their results, by deranging the relations of the present existing forces, should destroy the political counterpoise, and throw all into confusion. The several conflicting pretensions are balanced in the present order of things: and in this consists the wisdom and perfection of the government. Whatever may endanger it is madness, and may draw in its train the destruction of the political machine.

Every Englishman is brought up in this notion, that solely by his own courage and personal attention can he preserve his rights and property, unceasingly threatened by the schemes of innovators. He knows well that the loss of his privileges would soon be followed by the loss of his property, and that no reason exists why one would be respected more than the other. The consequence is that he is always ready to defend them with his life and fortune. Far from resembling the French, who are accustomed to enjoy at their ease the fruits of their industry and the inheritance bequeathed by their fathers, leaving to government the whole care of protecting them, the English take the burthen upon themselves, and

conceive this charge to constitute their primary duty and most important concern. They are born, as it were, soldiers for this peculiar species of warfare, and the tendency of their whole education is to render them fit for conducting it successfully.

Such is the true cause of their so much vaunted patriotism. Not that I wish to deny what is termed their public spirit and readiness to make every sacrifice for the defence, and even glory of their country: but this feeling, which speaks so powerfully to their hearts in great political junctures, is not that, I think, to which should be exclusively attributed their constant regularity in performing their duties as members of community. This steady conduct is derived chiefly from their own private interest, and the opinion of all classes, some that their liberties, others that their fortunes, rank and privileges are inseparably connected with the uninterrupted exercise of their rights derived from the constitution. It is this conviction which prompts the principal land-holders of each county to get their names put down in the grand jury list, to be inserted in the commission of the peace, and take upon themselves the troublesome office of magistrates. It is still further this conviction which renders the electors so jealous of their rights,

in which they find, as I shall show presently, a perpetual source of respect and kindness from the greatest noblemen of the county ; and which gives birth in petty jurors to such a noble attachment to their duty, in the assurance that their lives, liberties, and fortunes are by this means guarded from the assaults of power and tyranny. It is from the same motive that all the sons of farmers and land-holders of moderate fortune, enter the *yeomanry*, a corps of cavalry having for its main object to hold a check over the peasantry and mechanics ; and that the sons of the greater land-owners voluntarily place themselves at the sheriff's disposal, to serve as special constables, in case the public peace should be disturbed by seditious commotions. Once in possession of this temporary office, furnished only with a simple staff, their distinguishing mark, they are seen to rush into the midst of the most tumultuous mob, exhorting the people to disperse ; and if entreaties be unavailing, to seize the ring-leaders at the peril of their lives. And let it not be thought that this tender of their services consists merely in words, and that it is easy, in time of peril, to evade their self-imposed obligation. If, on the sheriff's summons, they should fail to hasten to the scene of tumult, they would assuredly be severely

punished upon the restoration of tranquillity, as guilty of a neglect of duty, and condemned inevitably to a fine, proportioned to their property and cowardice.

All this care, trouble, and even danger, is not a burden in the eyes of the English: they regard it as the necessary consequence of their liberty, and they make it a business, an interest, a pleasure. Their rights and privileges appear to them more valuable from the very trouble they occasion: just as a child becomes dearer to its mother from the pains experienced at its birth, and the anxious cares caused in infancy. Were it not for this kind of agitation, arising from these several demands upon their time, their lives would be wasted away in their vast mansions, and they would absolutely die of plenty, happiness, and listlessness.

But all these sacrifices, just described, are nothing in comparison with those made by the principal land-holders of each county, to procure their own return to parliament, or that of their friends and adherents.

When I heard mention formerly in France of the enormous sums expended by the English to procure a seat in parliament, I was at a loss to imagine what great advantage they could derive from it, and in what way receive an equivalent. Where, indeed, find a

compensation for the loss of 4 or £5,000? I was unable to understand this problem: but at that time I was unacquainted with the nation's manners.

Accustomed to pass their lives on their estates, their prime necessity is public consideration: not that modest consideration, founded solely on a regard for private virtues, but that splendid and envied consideration, the fruit of power and influence: and, as the greatest proof of the latter, is to be returned to parliament, an Englishman is ready to make the greatest sacrifices to obtain this enviable situation.

A seat in parliament has a further especial attraction, in addition to its being the most certain mark of a member's actual influence in his county: it paves the way to still greater influence, more particularly when the member elected is in the interest of ministers. He becomes then the dispenser of every vacant office in the county. There is scarcely one but what is bestowed on his recommendation,—ecclesiastical benefices, public employments, sinecures, collectorships of excise duties, favours of every kind; nothing is refused: and ministers find in this a twofold advantage, of drawing closer by these obligations, the bond which attaches the member to their cause, and of ensuring the continuance of a vote in the next parliament, by

preparing the re-election of one of their adherents, through the medium of the gifts he has at his disposal.

There are in this way several great families which, from an hereditary attachment to government, seem to have made a tacit compact with it, covenanting to use their whole interest to return to parliament one of their own members, or friends, with this clause, that, in consideration of the sacrifices made by them, they shall have the almost entire disposal of every situation in the county. Thus, when Lord Lonsdale, for instance, expends from 30 to £40,000 to procure the return of his son, or some of his friends, it is less the honour of the representation which is bought at such an exorbitant price, than the sovereignty of Westmoreland.

In cities and counties where the opposition is the predominating party, the representation in Parliament is equally courted; it being a convincing proof that the member returned is regarded in the shire as the head of that party, or as the person best adapted, by his influence and abilities, to oppose and counteract the schemes of ministers.

But as this influence, so envied, over the electors, is liable to droop, as is the case with

every other popular affection, it is only by a constant succession of acts of kindness that its full vigour can be kept up: and we here see how this fondness for authority and supremacy, which, in all other nations, is the most usual cause of public woe and individual oppression, is, in England, on the contrary, the inexhaustible source of protection and good offices.

To form a ready notion upon how vast a scale those who aim at an influence in elections engage, as it were, to distribute their favours over their counties, I must acquaint the reader that the elective franchise is not confined in England, as in France, to a small number of individuals, but belongs to every person possessing a yearly income of forty shillings freehold property;* and in some privileged ci-

* In a recent republication of a spirited and patriotic pamphlet on the "Past and Present State of Ireland," there is the following note on the elective qualification in the sister kingdom. "An English reader will hardly understand what is meant in Ireland by the designation of *forty shillings freeholder*: he is a peasant of the lowest class, made a freeholder by his landlord for electioneering purposes. The mode of making freeholders is to grant the peasant his cottage, his garden, or his farm, by *lease* for one, two, or three lives: this tenure for lives transforms a *real leaseholder* into a *technical freeholder*—he swears that his tenement is worth

ties, as London and others, it is sufficient, to enjoy it, to form part of certain corporate bodies: * so that, with the exception of the very lower orders, whose influence in elections is however very considerable, as I shall show presently, every person has the power of co-operating in the election of members of parliament. †

forty shillings a year, and thus acquires the *elective franchise*; which, in the mode in which it is exercised, would be more fitly termed the *elective servitude*. In general, the landlord directs the votes of these poor creatures according to his own will; but instances have occurred, in which bigotry was stronger than interest, and the secret influence of the priest prevailed over the natural power of the landlord; but in whatever view the matter is considered, the forty shillings-freeholders are a political and moral abuse."—Tr.

* There is a difference, as is well known, in our civic privileges. In the secondary cities the right of voting is in the freemen, after paying about fifty shillings. In the Metropolis, the elective franchise is not in freemen, but liverymen. The freedom must first be taken up, and then the livery, the price of which varies according to the wealth or poverty of the company. There are many persons who purchase their freedom in one of the minor companies, to be entitled to take a house in the City of London, for the purposes of trade, without any view to the ultimate acquisition of the elective franchise.—Tr.

† I have heard that in Westminster, to become an elector, it is only necessary to pay what is termed *scot and lot*, that is, parish rates, which are exacted from every individual who has a sort of fire-place where he may cook his dinner;

A candidate's first aim should then be to please this multitudinous body of people: and the surest means of gaining their good opinion is to treat them with respect, and to bestow upon them the regard they are justly entitled to, from their great number, their many useful callings, and the portion of public power placed in their hands.

What member would dare to receive, I do not say contemptuously, but even with an important air, an elector whose vote he had solicited a few years before, which he will again want on a future day, and who would then retort his scorn with usury? How would he dare refuse some assistance to the man who has openly declared himself his adherent? Will he suffer his wife or child to perish for want of relief? Will he enforce the payment of his debt? Will he refuse a renewal of his lease?

There is a great number of estates in England, belonging to the first noblemen of the kingdom, that are let at only half their value, in the sole view of ensuring votes at elections. Would it be an easy matter to shake electors possessing such advantages, and to intercept their votes from those to whom they stand

and that, at Liverpool, it is sufficient not to be on the list of poor receiving parish relief.

pledged, especially in a country where the voting is public? What vast advantages are spread over the nation by such a peculiar system of election! It renders the rich, in some respects, dependent on the poor; kindles a sympathetic feeling for the wretched in the hearts of those which might otherwise have been for ever shut to its influence; re-establishes, in some measure, natural equality between the high and low, and constrains the elder sons of nature to yield up a portion of the property of the common inheritance which had lapsed to them entire!

It is thus also that the owners of great manufacturing or trading establishments possess in their counties such importance. They are respected for the number of votes which they have at their disposal; I say disposal: for in this there is no sort of disgrace; and when a man who is dependent on another, votes differently from his employer, he is sure of losing his situation. Such conduct, which in France would be considered the extremity of injustice, experiences in England not the slightest hesitation. You must have, or at least follow, the political opinion of him who supplies you with the means of gaining your livelihood.

Another consequence of this system, which may be regarded as an additional advantage,

is, that none but very rich landholders can be returned to parliament. According to law, it is necessary to possess a landed income of six hundred a year, to be eligible to represent a county, and an income of half this to represent a town: but to sustain the expenses of an election, the candidate ought to have ten times this amount. So that, with the exception of members from *rotten boroughs*,* men absolutely devoted to the proprietors who appoint them, and pledged on their honour to vote as they do, all the members of the House of Com-

* Rotten boroughs are small towns destroyed by war or time, and which have obtained, by private charters, the right of returning a certain number of members to parliament. These towns are at present reduced to two or three houses, some, to only one: so that the right of nomination, which was anciently vested in the town, has now passed into the hands of two or three owners, and even of a single one, of what may be left standing.

There are other kinds of *rotten boroughs*, which consist in the property that some rich individuals possess in certain towns, of a third, a half, or still greater portion of the houses, to each of which is attached the right of voting at elections. A proprietor of this description composes in himself a majority, or nearly so, of the voters. It is in this way that Lord Fitzwilliam has a great portion of the votes in the city of Peterborough.

Mr. Pitt, in his plan of Parliamentary Reform, proposed a national purchase of the rotten boroughs, and calculated the sum at which this might be effected.—*Tr.*

mons generally belong to the wealthiest families; peers' sons constitute a great proportion of them. A house thus composed may well have some difference of opinion upon certain points of public administration: its various parties may be allowed to aspire to ministerial offices, and warmly dispute their possession: but should any plot be set on foot that might endanger the government, and consequently property, and the ranks and privileges established by law, the whole body would instantly coalesce, with one voice reject the innovation, and oppose an impassable bar to the efforts of the assailants.

When it is considered that of the six hundred and fifty-eight members of the House of Commons, for England, Scotland, and Ireland, there are three hundred and seven, nearly one half, elected by rotten boroughs, and whose nomination belongs exclusively to a hundred and fifty-four proprietors, one might suppose liberty extinct, and that all was about to be swallowed up by the aristocracy: there is however no country where liberty is more firmly established; and such is the extent of her dominion, that she is susceptible of no further augmentation without exposing the State to certain ruin.

Still more: these very rotten boroughs, the object of so much jealousy and declamation,

are perhaps a branch of its institution to which the Parliament of England owes its greatest splendour, and liberty her most intrepid advocates. Divided between families, of which some are on the ministerial side, others in opposition, they are the means of furnishing parliament with members equally opposed in their views, some engaged to support power, others to restrain it within proper bounds. They are besides the nursery of all great parliamentary talents; because their owners, desirous for the sake of their party, or credit, to produce men capable of boldly maintaining their own political opinion, usually return young barristers, or literary men the most distinguished by their abilities and eloquence; and it is in this manner that nearly all the men of genius who have successively shone in parliament, such as Chatham, Pitt, Fox, Burke, Romilly, and so many others not less illustrious, have found means of making themselves known to the nation. It is not till they become conspicuous for their talents in the House of Commons that they obtain the honour of being selected for Westminster, or some other city or county.

The aristocracy, as may be seen, is then the real governing power. It rules in the counties, where it occupies all administrative situations; it rules the whole kingdom by the parliamentary

power, which is also almost exclusively its office. The King is, as it were, but an imaginary being, a sort of idol intended to be placed on the altar as a visible object of the people's homage. It is overlaid with gold and precious stones to excite the more awe; the knee is bent before it with every mark of profound submission: but it is the ministers who are charged with its responses, and answerable for their effects. It is in their hands and not in the king's, that is deposited the regal power, the object of ambition in every member, generally, of the aristocracy. They contest it with bitterness: and when it chances to fall into vigorous hands, whence its seizure may be hopeless, the vanquished unite together to check its growth, lest it may ultimately prove injurious to their own rights and privileges.

But this aristocracy is not, as in some other countries, composed of a number more or less extensive of privileged families, whose whole power consists in the oppressions they have assumed the right to exercise over the people. It is the aristocracy of wealth and talents, the most natural and least offensive of all, as there is no family, no individual who may not one day aspire to an admittance and participation in its advantages. This very aristocracy is but a portion, too, of the general body of the people,

whom chance has insensibly raised above the rest. Some misfortune or extravagance often replunges them into it, and at any rate it is always connected with it by its junior branches. Its particular interest obliges it constantly to foster the good-will of the inferior classes of the people, that with them it may find a shield against the encroachments of the crown, and support it by their power against all attacks on its independence. We see, as the consequence of this, the greatest noblemen of England, the Dukes of Devonshire and Bedford, the Hollands, Lansdowns, Fitzwilliams, Grenvilles, Greys, and others, standing forth as the most ardent defenders of public liberty, of the trial by jury, the *Habeas Corpus act*, the liberty of the press, the right of petitioning and meeting, and of all those popular privileges exercised by the nation with such wild transport, that a stranger might fancy the institutions of Athens and Rome to have been transplanted to the banks of the Thames, the Humber, and the Mersey.

How can such a government, in which every Englishman, from the nobleman to the lowest individual, finds personal security, freedom of speech and writing, protection against every kind of oppression, the right of criticising every act of administration, and more or less

participation in the government of the state —how, I say, can such a government ever be destroyed, especially with a House of Commons composed almost entirely of those who derive the greatest advantage from it?

Let us now endeavour to exhibit a picture of those tumultuous elections which, while they last, would almost lead us to a belief that the people had thrown off the yoke of authority, threatening all who did not belong to them with inevitable ruin.

CHAPTER VII.

OF THE ELECTIONS.

MUCH noise was made in France respecting the late elections in England. Misled by false appearances, and altogether ignorant of the ordinary effects of genuine liberty, some French journalists described England as approaching her last hour. In their gloomy picture, the people had broken down all the banks of obedience; every one's life was endangered; and that devoted country was about to fall a prey to fire, murder, and universal pillage. The stone which had been thrown at Captain Maxwell * was considered

* Captain Maxwell, a very distinguished naval officer, came forward at the last election, as a candidate for Westminster. He was supported by ministers and their adherents, and, as a matter of course, had for enemies the opposition party, together with the people of London, who, I know not why, are attached to this party, whilst in other large towns, as Liverpool, for instance, they follow the standard of ministers. The captain might therefore ex-

the signal for a general revolution; and if the system of election which had caused such an

uproar, did not furnish a sufficient argument to meet with a strong opposition upon the hustings.* Every people has its own manner of showing disapprobation: in France, by hooting and hissing, in England, by hooting and mud. The King himself is pelted upon his way to Parliament when he has to make a communication displeasing to the multitude. Those who were dissatisfied with the captain wanted therefore to use their accustomed privilege, but the season had been so dry that no mud was to be found. As the hustings are constructed over a part of the market, the ground was every where strewed with fragments of various vegetables, cabbage-stocks, and such like. The people substituted these for their usual missiles. Unluckily a stone happened to be among some of the rubbish; this was snatched up by one, who, more skilful than the others, struck the captain with it over the eye. This was, certainly, a misfortune, and perhaps even an offence which deserved punishment: but should we, for an accident of this kind, reprehend a law which fills England for a month with a sort of frantic joy, which makes the meanest individual think himself a portion of the public authority, and that he has his share of influence in the government? And do you imagine that the captain himself, enraged at such excesses, and disgusted with a constitution which tolerated or even caused them, withdrew from the hustings, weeping over his country, and sighing to see it a prey to such licentiousness?—Undeceive yourselves: the next day,

* An erection of timber, in front of St. Paul's, Covent Garden, put up for the moment, where the votes are received, and from which the people are addressed when the polling is over, after four in the afternoon.

outrage were not immediately modified, or altogether abolished, England would inevitably become the scene of transactions of which all shuddered at the consequences. How far are we from understanding the mechanism of that

with his eye bound up with a bandage, he appeared on the very spot where he had been so hotly assaulted, and proceeded to harangue the very people who had so grossly ill-treated him. He began by informing them that he had been accustomed to another sort of shot than that which he received the day before, and gave an account of all the engagements he had been in. Great applause. He then added, that, as an Englishman, he was glad to see them so warmly oppose the election of those whom they suspected of soliciting their votes merely for the purpose of betraying their rights and liberties; they had therefore acted rightly, according to the opinion conceived of him, to oppose his election: but their error consisted in yielding too readily to the unfavourable impressions excited against him by his enemies. He finished his speech by saying, that their happiness was his only object, and that no where would they find a steadier defender of their privileges than himself. Here ended his triumph, and the uproar recommenced: he stood his ground unalarmed, and declared that, having the honour of being supported by such a numerous body of friends, he would sooner perish on the hustings than abandon his election. He continued, in fact, on his post, until a mad-headed fellow, drunk with tumult, rum and beer, struck him with his fist on the head, after he had left the hustings to go home; a violent fever ensued, which obliged him to keep his bed for seven or eight days.

government, and how different a spectacle is presented to the thinking foreigner in those much-abused elections! To his eye they display a people frantic with joy at the exercise of liberty, using it tumultuously, because uproar and turbulence are the essential characteristics of all popular acts. At the bare sight of a small constable's staff, carried by some obscure and insignificant individual, he sees all hushed into silence: he hears them vociferating their hopes and wishes with the confidence of their strength and importance in the state, assembling orderly every day at the hour appointed by the public officer, departing with equal order at the time for separation, cheering the candidates of their choice, conveying them in triumph and festive glee, wearing their favours, inscribing on their banners the principles to be adopted or opposed, and restraining all their wrath to hooting and hissing such of their opponents as they conceive interested in the existing abuses. This is the general picture of those elections painted in France in such dark colours.

The people, it is true, are not always exactly confined within the bounds of such moderate deportment: occasionally they give way to very reprehensible violence towards those candidates whom they suppose hostile to

their interests, hooting, and even stoning them, and breaking their windows. But such proceedings, which appear to us so shocking, are far from giving uneasiness to government; they scarcely even offend those who are the sufferers, because they form part of the nation's manners, and from time immemorial the populace, having been in the practice of testifying their discontent, esteem it a part of their prerogative to make it known in a marked manner. It is besides very seldom that any serious accident happens in the midst of all this confusion; a few broken windows, a few spoiled clothes, a few knocks given and returned, and at the utmost, a few slight contusions, being the extent of the mischief.

Let us now see how these elections are prepared. Two or three months before they begin, such as intend to offer themselves as candidates, signify their intention, and by addresses or public declarations, solicit the votes of the electors. Committees, consisting of the warmest partizans of each candidate, are then formed to forward and support his election: the place where they sit is made known by posting-bills, and all who wish to vote for their candidate, either from preference to his political opinion, or confidence in his abilities, are requested to use all their interest to secure his

return, and to contribute their portion to the indispensable expenses of the election.

These expenses consist, 1st, in the hire of the committee-room; 2dly, in printing addresses to the electors, and articles inserted in the public papers, explanatory of the candidate's claims, and the grounds of preference to his competitors; 3dly, in lawyers' fees, and money given to people employed to wait on the electors, and solicit their votes, called *canvassing*; 4thly, travelling charges, and payment to the electors of money laid out by them at the place of election, which must be reimbursed, many of them not having the means of supplying themselves out of their own pocket; 5thly, costs for erecting the hustings, and fees to the poll clerks; 6thly, in ribbands, commonly distributed at the time and place of election; in colours, banners, music, and refreshments which the candidate's friends, electors or not, receive throughout the day at taverns and public houses appointed for the purpose; lastly, in the dinner given after the candidate's success, and often too after his defeat.

These expenses vary according to the number of the electors, their poverty, and the distance they have to go, and amount sometimes to 90,000*l.* and at least to 1000*l.*: and

this will cease to excite wonder, when it is considered that the cost of ribbands alone amounts sometimes to 2,000*l.*; and that there are counties, Yorkshire for instance, where the expenses for the conveyance, maintenance when at the place, and return of an elector are about fifty guineas.

These expenses, as may be seen, contribute nothing to the profit of the elector, at most covering merely his own expenses and loss of time: they are therefore received openly, and without shame; and far from considering them as a motive of gratitude on his part towards the candidate who pays them, he regards the latter as indebted to him, for having consented to sacrifice his time, and undergo for his sake the fatigue of a long journey, and the trouble of leaving his home.

All electors are not however so scrupulous. There are some towns, as Hull in Yorkshire, where the votes are publicly bought and sold. A plumper fetches about three guineas, a half vote, half this sum. An elector is said to give a plumper when, having two votes at his disposal, because there are two members to be returned, he pledges himself to give one, and make no use of the other. He is said to give only a half vote when he splits his two votes between two rival candidates. The candidate who

purchases a whole vote acquires one complete name; if he buys only a half vote, he merely succeeds in counterbalancing the vote which may have been given to his opponent. It must however be acknowledged that the electors thus openly paid, vote only for candidates of the same political opinion with themselves; and that they regard the trifling pittance they receive, rather as a consideration for their loss of time, than the price of their vote.

At election time, therefore, the streets of London are covered with placards, informing the electors of the different counties there residing, that if they are disposed for such or such a candidate, at such an inn will be found conveyance to the place of election; that when there, they will be lodged and maintained at the expense of the candidate, and afterwards re-conveyed to London if they desire it.

The inn or public house pointed out as the place of rendezvous is made conspicuous by a great flag of the candidate's colour, with a motto on it pointing out his political party. The electors receive a similar flag, together with a large cockade of the same colour; and then, comfortably furnished with a good breakfast, they set off in coaches swift as the wind,

loaded inside and out,* rending the air with the name of their favourite, and waving their flag as a symbol of their participation in the same political sentiments.

In this way they traverse all England, followed and crossed by other stages, conveying electors in like manner, tricked out with their particular colours, and shouting as publicly sentiments quite the reverse, without however their differences of opinion giving rise to any squabbles but a few coarse jokes, or retorts courteous, by the two parties.

These indispensable heavy expenses are necessarily the means of repelling all candidates who have not the strongest grounds of success: and indeed for every member to be returned there are not more than two or three, at most, among whom the votes of the electors are to be divided.

The candidates do not content themselves merely with soliciting the votes of the electors, as I have already said, by their agents, but make it their business to go in person to the houses of all those who have engaged to vote for them, and persevere until they find them at home. I saw the sons of one of the richest

* The stages contain four places inside, and from ten to twelve outside.

peers in England, who were aspiring to represent their county, employ the two months preceding the election, in going over the whole shire to present in person their thanks to the electors whom they had canvassed by their agents, thus making doubly sure of their votes.

Let the reader imagine how such a representative system modifies all the inequalities of the aristocracy, and what an idea it gives the people of their importance. A common mechanic sees a great nobleman come to his house begging and praying that he will have the goodness to give him his support. Nor must it be thought that the meanest vote may be neglected: the last election at Hull, which I mentioned just before, depended on *a single vote*, and this town contains forty thousand souls.

On the day fixed for beginning the election, the candidates proceed to the hustings, sometimes without state, and sometimes in splendid coaches, drawn by horses ornamented with their party-colour ribbands. At a small distance from the hustings, they are met by their friends, all decorated with large cockades, and escorted in triumph to the place of election, preceded by a numerous band of music playing national airs, surrounded by a multitude of people, shouting and cheering them as they pass on.

fails to bring forward all these circumstances, and make use of them against his adversary. Still more: should his rival have been a member of the last parliament, and, upon any particular occasion, voted for a measure contrary to the prevailing opinion of the time, the popular candidate takes care to make due mention of it; exaggerating the odium of the measure, and its consequences; imputing all to his opponent, as if he alone were responsible for what may have happened, and holding him up to public indignation, as a man totally unworthy of their confidence. The latter is heard in his turn: and to regain the good opinion of the public, he is obliged to go back to the time when the objectionable measure was proposed, and to justify it by the necessity of circumstances. If the measure should, in fact, have been followed by any notorious abuse, he throws all the fault of it upon the agents charged with its execution; and claims credit for good intentions. The people listen attentively to all these contests; and rude and ignorant as they may be, they display a remarkable degree of acuteness in estimating the contradictory motives of the imputed actions; now and then pouring out bursts of applause at a good joke, or oratorical flourish, in the man whom they regard as their enemy:

but, after paying this tribute to his talents, they soon resume their prejudices against him, resulting from his political opinions, and by threats and clamour endeavour to make him give up the contest.

It must not however be thought that the electors, although approximating to the populace by the smallness of their property, allow themselves to be entirely influenced by the shouts of the surrounding multitude. If at any time they do yield to them, it is because these unanimous shoutings ultimately persuade them that the favourite candidate is indeed the one most adapted to ensure the welfare of the public: but when at any time they have placed their confidence in a candidate whom the people have rejected, they consider these shouts as the effect of thoughtless enthusiasm, and steadily persevere in their own choice. It was thus that on the first day of the election of Sir R. Wilson, whom the people of Southwark had proclaimed as their favourite, his rival Barclay nevertheless obtained a majority in spite of popular tumult.*

Four or five times in the course of the day,

* The poll became afterwards more favourable to the gallant general, and the electors showed themselves in such overwhelming numbers on his side, that Mr. Barclay was at last obliged to withdraw from the contest.

the people want to know the state of the *poll*, that is, the number of votes already given; when favourable to their own candidate, they vociferate their joyous acclamations, clap their hands at the electors who have polled, and cheer those who are coming forward to imitate them: on the other hand, they redouble their hissing against the adverse candidate, when they see him supported by the electors in contempt of their will.

During all these fluctuations of success, the candidates and their friends increase their exertions on the hustings. Some thank the electors for their support, others show their uneasiness, and make a public appeal to their partizans. They renew their justification, and present it in a form which they think more likely to please. During the continuance of the contest, there is a repetition of the same shouts of joy, the same marks of disapprobation, the same speeches, the same turbulence, and the same ardour, on both sides: and when at last the election is ended, the people are seen, like a sovereign about to depart on a long journey, to descend calmly from their throne, deposit their authority in the hands of their representatives, caution them that during their absence they shall watch over their actions, and upon their return, shall call them to

a strict account, and punish them for their negligence or treachery.

All the elections are decided by a simple majority of votes, that is, if two or three members are to be returned, the two or three who have the most votes are pronounced duly elected.

The number of members to be elected is not equally distributed among the towns or counties, according to their wealth and population. The right of sending members is grounded on private charters, granted in ages past to particular towns or counties; or on acts of parliament. There are whole towns which have of late years swelled to a great extent, such as Manchester and Birmingham, and are without the right of returning a single representative; whilst insignificant country towns, reduced sometimes to a single house, have retained the privilege of sending two or three.

When the votes are pretty nearly balanced between two candidates, and one leads the other only by a few, the loser examines strictly into those of his opponent, to see if they had the qualification required by law. When he thinks them bad, he demands a scrutiny of the sheriff, if for a county; or mayor, if for a privileged town: and the matter is publicly tried by these officers, assisted by one or two

legal gentlemen whom they take as counsel. The cause is pleaded in open court; each of the candidates retains one or two barristers to support his claims, examine the witnesses, and cross-question his opponent's; and the sheriff, or mayor, makes known his decision after consulting the counsel selected as assistants. This decision is final.

But should the election be opposed on account of some vicious proceeding, which may have the effect of setting it aside, as, if some of the electors had been hindered from coming to the hustings to give their votes; if some among them had been bribed; if votes had been received after the prescribed time, or after the closing of the books; or if a peer had publicly taken part in the election, &c. * a petition to set it aside would then be presented to the House of Commons, who would decide in last resort.

Some time after the election, comes the day for the *chairing*, that is, the triumph appointed by the partizans of the successful candidate. Hand-bills are printed and circulated in abundance, describing the place he is to start from,

* There are no positive laws prohibiting a peer from taking part in elections: but custom is against it, and the House of Commons has sometimes set aside elections under this pretext.

the road to be taken, and the order of the procession. All such as feel personally interested in the member returned, or who profess the same political opinion, make a point of adorning the ceremony ; ladies take their stations at the windows as he passes, splendidly attired, and wearing his colours ; the gentlemen accompany him on horseback or in carriages ; flags, covered with mottoes suitable to the sentiments of the occasion, precede his coach, and are cheered by the shouts of the bye-standers. The member at last appears, like a triumphant Roman, erect in his open coach, showing himself to his friends, receiving their plaudits, and followed by a vast concourse of people delighted with the beauty of the spectacle, and jealous of exercising once more a last act of power, by confirming, with transports of joy, the mission of their representative.

The procession is concluded by a grand dinner, at which are assembled sometimes as many as four or five hundred electors, whilst outside the dining-room streams of beer flow in abundance, for such of the people as cannot be admitted at the banquet. Toasts are afterwards given, by the member and the gentlemen of his committee, or by some of the company, to the King, the royal family, the inde-

pendence of England, the constitution, the revolution of 1688, the principles which placed the house of Brunswick on the throne, and to the perpetuity of the sentiments which then animate the electors. These toasts are passed to the people by guests nearest the windows, and are answered by cheers and universal shoutings. They then sing in chorus the national airs of God save the King, Rule Britannia, and numerous others, calculated to warm every heart, and inspire them with an imperishable love of those noble institutions which, after assembling all in the same duties, unite them still in the same desires, the same emotions, and the enjoyment of the same pleasures.

I could wish I had the power of entering here into some details on the operations of the great political body created by these elections: but unfortunately the shortness of my stay prevented me from obtaining an accurate insight into the different parties that divide the parliament, the real designs of each, their present strength, and the probability of their increase or diminution; and also of ascertaining the degree of influence of ministers over the two houses, and the portion of independence preserved by them under the action of that influence.

But whatever may be the ordinary devotion of the majority, it is certain that this devotion by no means resembles that positive slavery of our representative chambers under the despotism of Buonaparte. Their approval of measures proposed by ministers is rather the result of conviction of their propriety, and of well-grounded approbation of their system of government, than a blind subjection to their authority. This system is not adopted by ministers from the plenitude of their power, but always decided upon between the leading members of the majority, and it is only by allowing them a participation of their power that ministers can ensure their support.

Another motive which induces ministers to concert with them on all great measures of administration, is the indefinite responsibility to which they are liable, and the certain danger which they incur, should a miscarriage ensue in any important operation that has not received the assent of the leading members of the two houses.

It may perhaps be of use to show in what manner this responsibility is exercised; and as the procedure followed on this occasion is the same both with respect to ministers and other public functionaries impeached by the

House of Commons in the House of Lords, as well as with respect to peers themselves when guilty of any crimes, it will be sufficient to explain how the House of Lords in general exercises its authority when acting as a court of criminal justice.

CHAPTER VIII.

OF THE HOUSE OF LORDS, CONSIDERED AS A
COURT OF CRIMINAL JUSTICE; OF THE RE-
SPONSIBILITY OF MINISTERS, AND THE
LIBERTY OF THE PRESS.

WE must first distinguish what is the nature of the charge against the prisoner, and also whether parliament is sitting, and consequently the House of Lords assembled, or whether it is prorogued.

Every peer charged with what we call a *crime*, and which the English call by the general name of felony, may be prosecuted *in the same manner* as every other person. A warrant is issued against him by a justice of peace of the county where the crime was committed: he is questioned, confronted with the witnesses, and committed to the assize prison, like ordinary prisoners.

When the assizes come on, a bill of indictment is in like manner presented against him to the grand jury by the prosecuting party; this goes through the same process as other bills.

If the bill is found, the peer is brought to trial; and here begins the difference of the procedure.

One of the fundamental maxims of the English constitution is that every one has the right of being tried by his equals; now as a peer has and can have no equals but among the Lords, he has the right of claiming them for judges, and the court of assize, where he makes his demand, is obliged to entertain it. But the peer is at liberty to waive his right, and to suffer himself to be tried by the ordinary jury: in this case his trial is conducted exactly in the same manner as that of a private individual, and he is subject to the same penalties.

But if the peer claims his privilege, the form of trial will still be different according as parliament may or may not be sitting.

In the first case, the peer will be tried by the House of Lords, and his case conducted there, as all other criminal causes in courts of assize: the counsel of the prosecutor and defendant questioning the witnesses successively, the Lord Chancellor afterwards summing up. The only difference is that the Lords are both judge and jury, giving their opinion successively and by a simple majority both upon the fact and point of law, that is, upon the fact of

culpability, and upon the punishment to be inflicted. It is unnecessary to say that this proceeding is public, since it is in this way alone that decisions are given in England in important cases.

A further difference between the procedure in the House of Lords and the assize court is that the prisoner can make no challenges. The Lord Chancellor, in a general exhortation, merely requests such peers as may bear the prisoner any ill-will to withdraw, and all who remain are his judges.

When the House of Lords is thus constituted as a criminal court, it is called *the court of the King in parliament*.

When parliament is not sitting, the King, upon information that a bill has been found against a peer by a grand jury, constitutes a *high steward* to preside in a court appointed to take cognizance of the cause. This officer is almost always chosen from the House of Lords,* but this is not indispensably necessary. All the peers, or only such as the high steward may please to select, are summoned to assist him, and there must be at least twelve before they can proceed with the prisoner's trial. The high steward may also summon

* Generally the Lord Chancellor.—Tr.

the twelve judges, to be present at the trial, to give their advice upon questions of law. The prisoner is allowed to make no challenge, but the steward makes a like exhortation with the chancellor's in the case just mentioned.

This court, thus composed of an indeterminate number of peers and of the high steward, is called *the court of the Lord High Steward*. This officer performs exactly the same duty as the twelve judges in the assize-courts; he sums up the evidence, and passes sentence. The peers perform the duty of a jury only; if they consist of no more than twelve, their verdict must be unanimous; if more, it may be returned by a majority, provided this majority be not less than twelve. In all other respects the process is carried on in the same manner as in courts of assize.

In cases of misdemeanors, peers are tried at the quarter-sessions like other persons. Their privilege of being tried by their equals exists only in case of felony, that is, for attacks on social order, called by us *crimes*.

But when peers are accused by the Commons, it is indispensably necessary that they be tried by *the court of the King in parliament*, that is, by the House of Lords; and not by *the court of the High Steward*.

Peers are not the only persons who may be

impeached by the Commons, and who, as such, must be tried by the House of Lords: all great public officers, ministers of state, generals, judges, and all others, are amenable to the House of Commons, which has the right of sending up articles of *impeachment* against them.

To furnish ground for an *impeachment*, it is not requisite that the public functionary should have been guilty of a crime provided for by common or statute law: any act whatsoever may be the subject of an impeachment, if it appears to the Commons contrary to the interest of the state, or to the official duties incumbent on the person who has committed it. The House would never consent to specify the cases of responsibility either in ministers or any other public functionary, because they would then find themselves deprived of their right of watching over and prosecuting in all cases but those prescribed. By preserving their powers thus undefined, the House of Commons retains the most active inspection over all parts of administration, and compels ministers to take their advice, and to ensure their approbation beforehand, in all great affairs, to prevent their conduct being one day the subject of an impeachment.

When the Commons have resolved upon

impeaching a minister, general, judge, or any other great public functionary, (for with respect to those who fill inferior situations, it is satisfied with voting an address to the King, begging him to order his *attorney general** to prosecute the party,) they send a message to the Lords, signifying that they have drawn up articles of impeachment, which it is their wish to lay before their lordships. The Lords answer by a message, that they are ready to receive them. The Commons then proceed in a body to the House of Lords, and present, through their president, their articles of im-

* The *attorney general* is usually one of the most distinguished counsel at the bar. He is appointed by the King to plead in his name in all cases in which he is interested, either as a private individual or head of the state. He makes no part of the magistracy, and is attached to no particular court: he pleads in all courts before which the King may think fit to bring the party. The duties of his office place him, with respect to the crown, in a situation nearly resembling that of the pleaders of our great administrations with respect to those administrations. As all criminal cases are supposed to be carried on in the King's name, the attorney general would have the right of pleading personally and of establishing himself the prisoner's guilt: but he generally leaves this to the interest or resentment of the plaintiff, confining himself to the prosecution of crimes or offences which have a more or less direct bearing upon government, as high and petty treason, slander, libel, and such others. Under him is an officer termed the *solicitor general*.

peachment to the Lord Chancellor: these are read and placed on the table.

The Commons then beg the Lords to appoint a place and day on which they may follow up their impeachment; and the latter, acceding to their request, generally select Westminster Hall; for the place must be sufficiently spacious to contain not only the Lords, but also the Commons, who have the right of assisting in the trial as prosecutors.

After these preliminaries, the Commons forthwith appoint some of their own members as *a committee of managers*, who are especially commissioned to carry on the prosecution in their name.

On the day fixed, the Lords and Commons proceed to the place appointed. Most of the peers, on account of the solemnity of the occasion, go in their robes, although not obliged to do so.

The prisoner, who, ten days previously, is made acquainted with the articles of impeachment, pleads *guilty* or *not guilty*.

In the first instance, the Lords have only to decide upon the punishment; in the second, the cause is carried on before them by the committee of managers and the defendant's counsel, exactly in the same manner as in the assize-courts.

All the peers are at the same time judges on the question of fact and law, and their decision is given by a majority, and publicly.

When the defendant is found guilty, if the crime has been foreseen by a statute, he is condemned to suffer the punishment prescribed; but if the crime is provided for by no law, as, for example, if the charge against him be incapacity or negligence, he is condemned either to fine or imprisonment, of which the amount and duration are left in the discretion of the House of Lords; or else he is declared incapable of holding any public office or situation; sometimes these three punishments are inflicted together: but in this case, he must never be sentenced to the loss of *life* or *limb*. The King, in these circumstances, has no right of pardoning the prisoner.*

Occasionally, and when the crime is of a nature not to be proved by ordinary means, or when the accused, from his situation, is out of the reach of the prosecution against him, as in the case of a general at the head of an army devoted to his interest, a law has been expressly passed by parliament, declaring him guilty, and awarding the punishment. This is called an *ex post facto law*, because made

* Opinions however are not quite unanimous on this point.

after the commission of the crime. The trial is then carried on in the prisoner's absence by united committees of the Houses of Lords and Commons, who examine witnesses, and afterwards report to their respective Houses. The condemnation which ensues is styled a *bill of attainder*, or a *bill of pains and penalties*.

No instance of such a procedure is found in modern times, and all public writers unanimously condemn it. It was formerly employed, in times of commotion, to gratify party-revenge: but public opinion would now reject it, and for ever oppose its revival.

Yet it must not be supposed that the King's ministers are thus abandoned, without defence, to the passions of the Houses of Lords and Commons. When an impeachment is directed against a minister possessing the King's confidence, and it is apprehended the animosity of the House of Commons may exert too great an influence over the decision of the House of Lords, the King has his resource in the dissolution of parliament, and of thus making an appeal to the nation. The impeachment is then suspended till the election of a new parliament, which may either abandon or follow it up as may be thought best. In the former case, the minister is considered as acquitted,

by the new parliament of the crimes or misdemeanors which the angry passions of the preceding parliament may have too lightly imputed to him; in the second, his trial is conducted in the form just mentioned, and the King is legally informed that his minister's conduct was reprehensible, or at least odious to the nation; and that the direction given by him to the government being contrary to public opinion, it became indispensably requisite to change it.

It is however on such important occasions that the whole force, and, as it were, the whole richness of the movements of the political machine are developed. In all quarters, corporations, assemblies, grand juries, justices of peace and freeholders, all examine the charges against the minister; and, in addresses penned in spirited language, encourage the House of Commons to proceed vigorously with the impeachment, or urge its abandonment.

This liberty, possessed by all classes of the nation, of acquainting government legally, and without recurring to mobs or insurrections, with their private opinion on all the measures of administration, forms the main perfection of the English constitution.

That constitution was never created nor imagined by one person. It is found written

in no particular act, the fruit of some great legislator's meditation and labour, but is the combined result of time, experience, and that wonderful constancy of the people of England in imparting a fructifying strength and vigour to all the seeds of liberty found scattered in their old Saxon laws. Whilst all the other people of Europe permitted these rich seeds to perish by neglect, or suffered tyrants to crush them under their own eyes, the English set carefully about their cultivation, and they now enjoy from them an abundant harvest. Their national assemblies, whether from patriotism or for the sake of their own power, from age to age added fresh guarantees to their liberties, and neglected no opportunity of strengthening the rights of the people, of whom each member made part as a private individual, and whence, as a public man, he drew all his power and dignity. The first care of these assemblies was to place every person out of the reach of the resentment of the crown and the great, by establishing the trial by jury, by the *habeas corpus* act, and the liberty of the press. Their second, was to preserve for the nation the right of inspection and control over all the operations of government. But feeling the impossibility of summoning a great people to deliberate in a body on their concerns, and

perceiving, besides, the danger of such an assemblage, even were it possible, they split them into a multiplicity of small insulated bodies, to which they gave the right of examining all acts of government, and the conduct of their agents. Thus the freeholders of each county, when convoked for the election of any officer, as coroner; the inhabitants of towns assembled by their mayor or aldermen; the grand juries at assizes and quarter-sessions, justices of peace on the same occasions; all have the liberty of transmitting their complaints to the King and the parliament, and often use it with the greatest freedom. Add to this vast number of deliberating bodies the entire mass of the people themselves at election-time, who, although deprived of the right of voting, surround the hustings, as I have explained above, and loudly proclaim their candidate and their wishes, and it will be allowed that not without reason do the whole people of England conceive they participate in the government of their country. There is nothing consequently which such a government may not undertake while it acts in unison with public opinion. Whenever any important subject is submitted to the discussion of parliament, the King and the two Houses have the advantage of seeing clearly the na-

tion's opinion upon the proposed measure, and of ascertaining how far it should be pressed or abandoned: and it is thus that the strength of the people, which, united in one single mass, would form a torrent whose accumulated waves might, at the first obstacle, overwhelm the government, divided, on the contrary, into an infinite number of individual bodies, resemble a number of peaceful brooks, which adorn and fertilize the plains they water, without the power of ever doing mischief.

This public opinion, so powerful and vigilant, is chiefly maintained and put in action by the manner of administering justice, and the boundless liberty of the press. With the exception of the twelve judges, civil and criminal justice in England is administered gratuitously, as we have already seen, by the cares of the people themselves, and at their own expense. Justices of peace and sheriffs also perform their duties without any emolument, and it is extremely rare that they are ever open to the charge of negligence. The assizes and quarter-sessions furnish juries with frequent opportunities of hearing the full development of all the principles of public liberty. Raised by the nature of their office to a temporary authority, derived from the right of deciding on the life, property and reputation

of their fellow-subjects, they are treated with the greatest deference by the judges, and instructed by the counsel to regard themselves as one of the most important wheels in the grand machine of government. All these united circumstances tend to maintain the minds and opinions of all classes of society in a wholesome agitation, and bring the obscurest individuals in perpetual connection with the most exalted persons of the state. They nourish in the minds of all a spirit of equality and reciprocal dependence, which makes the inequalities of wealth and rank supported without a murmur; and inspire the English with an ardent love of that liberty they value so highly for its benefits, and for which they know how to make such noble sacrifices.

Even the parliament, although far from offering a perfect system of representation, and appearing devoted more especially to the interest of the aristocracy, is constrained to follow in the track of public opinion, with which all may be performed, and without it nothing. Should parliament sometimes enlighten and reclaim this public opinion by superior reason, and a more intimate knowledge of the true interests of the state, never does it fail to yield, when pronounced in a firm and determined tone: and it is by means of this

action, at the same time so tranquil and powerful, of the nation upon the two houses, and of the two houses upon the nation, that the real government of England resides truly and solely in the people, and that it can never fear being overthrown by any violent convulsion.

Without danger, therefore, may the press be left to its complete independence, and allowed to riot in the most wanton licentiousness; so convinced are the government that all the passions it may excite will dash harmlessly against the strong institutions upon which public tranquillity is founded.

Nothing indeed can give an idea of the unbounded freedom of all that is printed, except the licentiousness which we have endeavoured to describe at election-time. That turbulence, so harmless, if not even requisite to the consolidation of the English constitution, in which it forms a constituent element, is what misleads foreigners upon the state of England. When, on the other side of the channel, certain pamphlets are read, or mention is made of scenes of tumult, people imagine that all the land-holders of the three kingdoms are aghast, and regard themselves as the next victims of popular fury. Strange mistake! With cool disdain they behold the seditious crowd pass on; and such is their security against the puny efforts of

the multitude, that they are less angry with them than disposed to sigh at the misery which urges them to such sad extremities.

There is no law in England defining with precision what is libel. Every book injurious to private reputation or public morals, to the respect due to the King, or religion, is considered an offence at common law, and punishable.

It was formerly a question much agitated, whether, in cases of libel, the powers of a jury were limited to ascertain the fact of publication; and after finding the publication, whether they were bound to follow the judge's direction, as to the book's being considered libellous.

At the time of the famous bill brought forward by Mr. Fox, and supported by Lord Erskine, in 1792, called *Fox's libel bill*, the object of which was to put an end to these doubts, and to determine precisely the power of juries, several questions were transmitted by the House of Lords to the twelve judges, requesting their opinion upon various points of law relating to this subject: and from the answers to these questions, it would seem as if the judges consider juries bound to adopt their opinion on the point of law, according to this axiom, *de jure respondent judices, de facto jurati, the judges decide on the question of law, the jury on the fact.*

This doctrine was laid down in the reign of Charles II. at the time that famous act was passed, regulating the liberty of the press, an act characterized as *scandalous* by almost all public writers.

By this act no person was allowed to print or cause to be printed any book or pamphlet whatsoever, unless it should previously have received a legal permission from persons appointed to exercise the censorship under the act.

Law books were to receive permission from the Lord Chancellor, or one of the chief justices of the great courts; history or politics, from one of the principal secretaries of state; and *novels, romances, and fairy tales*, or books treating of philosophy, mathematics, medicine, religion, and even *love*, were to receive their imprimatur from the Archbishop of Canterbury or the Bishop of London, as if, adds the author who gives an account of this law, the statesmen who framed it, supposed those reverend prelates to be, of all men of the kingdom, the best versed in such matters.

This act appears to have remained in operation no more than three or four years: but it has left very great uncertainty respecting the powers of judges and juries in questions of libel.

Many public writers, however, and Blackstone in particular, have laid it down, that, *on all subjects*, juries have the right of deciding, according to their own reason, *upon the general issue*, that is, upon *all points of the case*, thus including of course those both of *law* and *fact*.

Mr. Fox's partizans drew another argument in favour of the jury, from their undisputed power, granted by law, of returning only a *special verdict* in cases where, being in doubt on the interpretation of the law, they might think proper to refer to the judge for his decision. If they are at liberty, said Mr. Fox, to submit to the judges, when they please, the decision of questions of law, it is evident they may also, when they please, keep the decision of such questions in their own hands.

The judges, on their side, could not deny the right in juries of returning a *general verdict*, which would contain the solution of all the points of the cause; but they maintained that the duty of juries, in this case, was to answer to the question of fact, according to the evidence before them, and to the question of law, according to the direction given to them by the judge.

To this it was answered, that so far from its being true that juries were to comply blindly with the decision of the judges upon the point

of law, that, in times when it was customary to fine juries in certain cases, juries had in fact incurred a punishment of this kind, *for having agreed among themselves to return their verdict according to the opinion of the court upon the point of law*; and the following case was cited in support of this allegation: A man was accused of wilful murder, and after admitting the charge, he had confined his defence to a declaration that it did not amount to wilful murder. The jury were unable to make up their minds on the question: the majority however appeared inclined to bring the prisoner in *not guilty*. To be brief: *they came to an agreement in this manner; that they would bring in and offer their verdict, not guilty; and if the court disliked it, that then they should all change their verdict, and find him guilty*. Having thus formed their plan, they in fact delivered, first of all, a verdict of *not guilty*; and the court, as they had foreseen, disapproving it, and having sent them back to deliberate afresh, they returned into court with another verdict of *guilty*. This manœuvre being unmasked to the court by two of their colleagues, they were all fined and imprisoned, with the exception of the two who divulged it, *for having, when they were not agreed among themselves upon the point of law, entered into an agreement to bring*

in a verdict as if they were agreed, and, in blind compliance with the opinion of the court in matter of law.

Mr. Fox's partizans maintained therefore, that juries had not only the right, in all cases, to return *a general verdict according to their own reason*, but moreover that it was their duty to do so; and that it would be betraying their oaths to return *special verdicts*, except in any cases where they felt themselves unable to decide the point of law.

These doctrines prevailed, and it was solemnly decided that in questions of libel, juries should be authorized to return a general verdict on every part of the accusation.

In consequence of this decision, it is extremely rare that government, that is, ministers, prosecute as libellers those writers who criticise their proceedings, however gross their invectives. They know that every morning they shall be abused in the most shameless manner by the *Morning Chronicle*; but that their measures will, in return, be defended and cried up by the *Courier*. It is only therefore at the last extremity, and when the insult appears to them altogether insupportable, that they determine upon prosecuting the offender: but even in this case their attempt is generally abortive, either because the jury, as members of com-

munity, are afraid of impairing in the slightest degree the invaluable privilege of speaking freely on the operations of government, and the persons of ministers; or because as men, it is not without a secret joy, they see the humiliation of persons so exalted in the state; or lastly, because they are persuaded that even the licentiousness of the press is absolutely harmless, and probably not altogether without utility.

I brought with me a report of one of the most scandalous cases of this kind, a libel truly alarming, against Lord Castlereagh and Mr. Canning, for which they were never able to get the author punished.

Government therefore make up their minds, with a good grace, to every kind of outrage: they throw aside all feeling, shut their ears, harden their hearts, and leave the whole burden of their defence to their friends: but when at any time their patience is exhausted by the excessive violence of the abuse, and they are resolved at length upon a prosecution; or when a private person, wounded in his character, is desirous of obtaining justice against a slanderer, the following is the customary manner of proceeding.

A prosecution for libel may take place in two ways, civilly or criminally.

When the injured party proceeds *civilly*, the case is conducted as all other civil cases, and decided either by a special or common jury, at the option of the parties: and the *jury*, by their verdict, award the damages claimed by the plaintiff.

It is proper to observe here that, as the end proposed by the action is a reparation of the injury which the plaintiff alleges to have received by the publication of the libel, the author is allowed to prove the truth of what he has advanced, with the view of being able to draw this conclusion, that, the facts being true, he has caused no injury, or at least, but a very trifling one, to the plaintiff by his publication.

: It is by no means the same when the plaintiff proceeds *criminally*; in this case, his object is to prove, not the injury done to himself, but the offence against the public by the defendant, which consists in his having disturbed the King's peace, by provoking the plaintiff to break it by an offensive exposure calculated to excite his resentment. It matters not whether the statement be true or false, since, in either case, its tendency was to excite a desire of revenge in the plaintiff, and more indeed in the first case than in the second. It is for this reason that in the criminal process the defend-

ant is not permitted to justify himself by proving the truth of what he has published.

A criminal action against a libeller may be entered in two different manners, and the punishment is likewise awarded differently, according as the prosecutor proceeds by *indictment* or *information*.

If by *indictment*, the bill is presented to the grand jury in the usual form; and if found, the cause is tried at the assizes (*crown side*), that is, in the criminal court, by the petty jury, as all other causes of the session. Only, as the subject is simply a misdemeanor, the plaintiff and defendant are at liberty to demand, at their own costs, a special jury. After the verdict, *it is the judge* who awards the punishment, either fine or imprisonment, as in all other criminal causes.

If it is wished to proceed by *information*, that is, be authorized to bring the cause directly before the petty jury, without the intervention of the grand jury, permission must be obtained from the Court of King's Bench: the attorney general is the only person dispensed from this preliminary formality, and may, *de plano*, proceed direct by information.

The court is at liberty to refuse or grant leave to proceed by information. If refused, the plaintiff is obliged to renounce this parti-

cular form of action, and return to the ordinary way of indictment, unless he prefer proceeding civilly. But if the court grant leave to proceed by information, or in the case of a prosecution by the attorney general, then the cause is sent to *nisi prius* by the Court of King's Bench, to be tried in the county where the publication took place, and be there brought before an ordinary or special jury, at the will of the parties, in the case of misdemeanor, but not of high or petty treason.

In this latter case, and generally in all cases of felony, the King's Bench cannot grant leave to prosecute by information, neither can the attorney general adopt this mode of procedure. All parties must then positively proceed by indictment, and submit the charge to the examination of the grand jury.

The fact of publication and that of libel are established in the *nisi prius* court according to the customary forms: but this court has not authority, in process by information, to award the punishment incurred by the delinquent; and this punishment is always pronounced by the *Court of King's Bench*, before which he is brought up for judgment. The punishment is usually fine or imprisonment, or almost always both together: but the seizure of the work is never ordered. The presence of the author

does not hinder the printer and bookseller from being also prosecuted; and should the former be punished for having written the work, the others are so for publishing it.

If a case of libel were brought to the quarter-sessions by indictment, and the King's Bench thought proper to take cognizance of it, it would issue a writ of *certiorari facias*, that is, would summon the case before it, and would then proceed in the manner just pointed out.

In cases where government are a party, it is extremely rare that they proceed otherwise than by information: I wished to ascertain the motive for this, but am not altogether satisfied with the reason given me.

The process by information, it is said, gives government the advantage of being dispensed from the obligation of submitting a bill to the grand jury. But why fear a grand jury? If they deem their accusation sufficiently important and the proofs sufficiently strong to expect a verdict from the petty jury, what cause for fearing lest their charge should be rejected by the grand jury, which has to decide not on the positive guilt, but on the mere presumption of it? Why should the grand jury be more difficult in the admissibility of evidence than the petty jury, whose duty it is to establish the

conviction? It is added, that there is still one chance the less for the prisoner; but for the reason which I have just mentioned, this chance is so slight that it does not appear to me to merit much consideration.

There probably exists then some other motive, with which I am unacquainted, that induces government to proceed always by information. Can it be that, as the grand jury from their property and rank in life are more independent of government, ministers apprehend they have less influence over them than the petty jury, and suppose that upon the attorney general's presenting, in person, an accusation against a private individual, the petty jury will receive a stronger impression than the grand jury, who are more accustomed to the presence of the great officers of state and to a display of public authority? This reason is insufficient: nor do I think the intervention of a superior government agent can make any very great impression on a people so free and reflecting as the English. The result of the trials against Hone and Wooler, instituted by ministers, proves unhappily but too much how indifferent even the petty jury are to the gross insults perpetually heaped upon them.

Mention has been made of the attorney general's privilege of protracting an information:

it has been said that he can begin a prosecution, abandon it, resume it, and thus for years suspend the terror of an action over the heads of author, printer, and bookseller.

It is true that no law prescribes the period of time within which the attorney general must confine his information: he is at liberty to lodge his complaint with a justice of peace, who issues a warrant against the prisoner, or holds him to bail; he may then drop the prosecution and resume it some time afterwards: he very seldom however uses all these petty means, but proceeds openly against his adversary: for every act of vexatious conduct against the latter, besides drawing down public indignation, would be only forging arms against himself.

Booksellers and printers are subjected to no sort of censorship, nor are they obliged to deposit a copy of every book at a public office appointed for this purpose. Every one prints what he chooses, on his own responsibility, and the fact of publication is proved only by the purchase of a copy of the libel: this purchase the plaintiff, whether a government officer, or a private person, has attested by two witnesses whom he contrives to send beforehand to the bookseller's shop, to buy the book forming the ground of prosecution.

But if juries are difficult in convicting for libel, when at the suit of any public responsible functionaries, and especially ministers, the case is reversed when they have to repress attacks on private character. Here no motive of public interest in their eyes can excuse the author. The injured party, by his pretensions, has mortified no one's vanity; nor has he displayed, in a greater or less degree, like every man who aspires to a public office, a merit which he conceives above the vulgar, and those superior qualifications which he supposes to adapt him to command others. No advantage derived from the distribution of state emolument, or the dispensation of national honours, has made him, in some measure, a just object of jealousy, or thrust him forward as a fresh proof of the blindness of fortune; nor has he collected in anticipation, in the fruition of luxury, or the intoxication of gratified pride, a compensation for the pains of satire: he lives humble and unknown, and has no pleasure but that of feeling himself beyond the reach of persecution. An adversary who should carry his attacks into the happy abode of so much modesty could be inspired with none but motives of hatred or revenge: his delinquency therefore presents an aspect of malice undeserving the smallest indulgence, and the secu-

rity of every individual, which forms so essential a part of public happiness, demands a signal visitation.

Such are the principal observations I have been able to collect on the administration of justice in England, an administration which appears to be altogether unknown in France, or at least of which I acknowledge myself to have had no very distinct idea when sent to examine it. I had read pretty nearly all that had been written on the subject, without obtaining that full conception of it which I have since gained, from a knowledge of its real state. I am far from pretending to have dissipated the mist which formerly darkened my own eyes. It is possible I may have ill depicted what I saw, and that many points may require a more complete elucidation. A few months stay were not sufficient to enable me to penetrate every thing, and I feel how much remains to be learnt in that country, so worthy of observation, and so rich in subjects for meditation. Allow that I have raised the veil which conceals it from our eyes, somewhat higher than my predecessors, and I shall be satisfied. Still more shall I be gratified if I have been able to infuse into those who are summoned to lay the foundations of our new government, a desire of going to

study, on one hand, that people so free, so submissive to the laws, so religious, and so full of respect for all powers, ranks, fortunes, dignities, and privileges lawfully established: and on the other, that aristocracy so beneficent, so esteemed, so beloved, exerting its vast power with such general approbation, and in such voluntary unison with the rest of the nation. What object, indeed, can be more worthy of reflection than that constitution so robust that, unmoved, it can support the most alarming licentiousness of the democracy; than that jealous nation, self-governed, self-administered, self-judged, almost without the aid of any government agent: and which, although not favoured with those external graces that so powerfully captivate and prepossess at first view, has yet profoundly affected all who have closely inspected it, and raised in them an irresistible desire of seeing transplanted to their own countries, its laws and institutions, as the only security for a complete and perfect alliance of power with liberty.

CHAPTER IX.

ON THE MANNERS FORMED IN ENGLAND BY
THE INFLUENCE OF THE CONSTITUTION.

THE English are still unknown to us, both as a nation, and as individuals. We believe them a brutal, perfidious, sullen people, full of hatred against us. It is however indisputable that there are few nations more hospitable, more unassuming, more obliging, and among whom may be found a greater number of individuals possessed of real goodness. We reproach them with being proud. Granted, they are so!—they believe themselves the first nation on earth. But if a people's true greatness consists in the perfection of their institutions, I ask any man of candour, whether they are wrong in being so proud of their's? What have we to oppose to their justices of peace, their grand juries, their sheriffs, their elections, their popular assemblies, so boisterous and yet generally so harmless; and lastly, to that multitude of gratuitous functions which render useless the intervention of any government agent?

The government of England has only, as it were, to look on: every thing moves and acts without the necessity of its assistance. What would become of us in France, were we left to the same freedom?

The two people may be compared to a couple of children playing on the brink of a precipice: the English, in their aristocracy, have placed a railing which prevents their falling over: we Frenchmen, too vain to wear the semblance of fear, have disdained to take the same precaution: but then it has been found necessary to hold us in leading-strings to prevent accidents, and we cannot take a single step unless accompanied by our conductors. When shall we put ourselves in a condition to do without them?

Nothing can equal the simplicity of English manners. Whatever is convenient, or contributes to make life smooth and easy, or wards off any inconvenience, always appears to them worthy of adoption. Correct in their feelings, they prefer the useful to the elegant. Their soldiers, and sometimes even their officers, are met in their uniforms, with round hats and an umbrella; a Frenchman would sooner die than be seen thus attired.

This extreme simplicity attends them even in the discussion of their greatest political con-

cerns. The members of parliament proceed to their respective Houses in the plainest dress. When there, they sit down without ceremony, beside their friends, with their hats on, if they choose it. The debate is usually opened by those who are the most accustomed to speak, just as it might take place in a private parlour. One simple remark gives rise to a second, then to a third, and at last a speech has been insensibly made, when a mere observation was all that was intended. It is in this way that talents are revealed to their possessors. A member who has never made a speech, imparts to those near him, and in a low voice, the reflections which a proposition may produce on his mind; he is heard with attention, he unfolds his ideas; the circle of his auditors expands; he raises his tone to be heard farther off; by degrees silence is made on all sides, he elevates his voice to its highest pitch, and thus becomes an orator. Had he been obliged to walk to a tribune placed pompously in the centre of the chamber, and had to sustain the formidable aspect of a numerous assembly in preparation to hear him, and to weigh all his words, he would have confined his ideas to his own breast: and the germ of talent would have been buried in obscurity, for want of being brought into action by the kindly warmth of public approbation.

Another very remarkable effect of this simplicity of manners is their easy indifference in public to the most illustrious men of their country. Nothing indicates in an assembly the presence of a great officer of the realm or grand dignitary. He is here the object of no peculiar homage or attention, nor every where surrounded by a troop of flatterers, seeking, by studied admiration, to court his good opinion, and sighing for a glance or a smile. Nor are the ladies, fancying themselves the appropriate channel of public gratitude, seen to cluster round him with their seductive charms, bewitching him with looks of tenderness and all the blandishments of their enthusiasm.

Perhaps I might be accused of partiality in speaking of their obliging disposition. The numerous attentions bestowed upon me might appear to have arisen from the object of a mission flattering to their pride: but I was not at all times in communication with them as the envoy commissioned by our government to investigate their laws: I was there likewise as a private individual, travelling for my own pleasure, and I can assert, that on those occasions also, I was still the object of the most attentive politeness.

Their courage is not the offspring of warmth

of blood, nor the effect of an immoderate aspiration after honours and distinctions; not impetuous, boiling and irresistible; courting danger, and defying fortune to produce perils that shall daunt it: but springs from reason and duty; calm and awful like the noble feeling that gives it birth. Nor do they rashly throw away their lives, like children staking their all, and attaching importance to nothing: they think them dear to their wives and still more to their mothers: but when demanded by the interest or glory of their country, they lay them down without hesitation or a murmur, like the Spartans at Thermopylæ. Nelson's signal at the battle of Trafalgar was, "England expects every man to do his duty." The world knows how he performed his!*

Their first pleasure is that of argument: even their common conversations have always a character of debate; and in their private meetings they form round the master of the house, like the members of the House of Commons round their speaker. The most in-

* This last signal of our immortal naval hero is probably the sublimest admonition upon going into battle, to be found in our history. The words and sentiments are peculiarly English. The well-known Vendean injunction is no doubt fine, but by no means equal to ours in simple and impressive grandeur.—*Tr.*

different subject, in which any particular society may be interested, is the object of a regular meeting, having its chairman, secretary, and rules, and where the order of debate is scrupulously maintained. Sometimes spacious rooms are hired, and opened to all such as wish to practise themselves to public speaking, and by paying a small entrance fee, every one is admitted to take part in the discussion, previously made known, of some point of general speculation.

No where has man shown himself more jealous of the power granted to him over all creation. There is no spot of earth that has not received the impression of his genius and his will. At his voice, valleys have risen up to level roads, and mountains opened to make way for a multitude of canals, uniting among themselves all the surrounding rivers, provinces, and seas. In Scotland, waters have been conducted to the tops of hills; and these new streams, astonished at the law which rules them, and suspended in the air in bridges and aqueducts, dash from rock to rock, cross rivers, and know no obstacles to impede their course. Lastly, the English have created, as it were, a soul in matter, and their machines execute by themselves such astonishing works, that they

appear like vast intelligent beings, no longer requiring the assistance of man.

We meet in England with young men of such engaging artlessness, that their cast of countenance appears to belong to the primitive ages of the world, and to have been transmitted from age to age in families that have escaped the corruptions of time. The sedateness of their looks, the purity of their hearts, and their modest deportment, has something inexpressibly captivating. Nothing equals the innocence of their conduct, and even of their thoughts. I knew some who had preserved this virginity of soul amidst the seductions of wealth, the dissipations of foreign travelling, and all the illusions of the world: in general therefore they make faithful husbands, and become fathers of large families, bounding all their pleasures to what they find at home.

English women sin by the very excess of those qualities that are most desirable in their sex. Their extreme reserve and gentleness, to a stranger's eye, wear the appearance of subjection and dependence, which gives rise to uneasiness respecting their lot. I have heard it said, however, that few wives possess a greater sway over their husbands, or have more authority in their own homes. In some

parts of their manners there is a modesty and dignity that has something poetic. The custom of leaving table before the gentlemen, and of thus withdrawing from the levity of conversation which the liberty of wine may excite, has the character of exquisite delicacy. The same remark may be made respecting their custom, when any number of them may be collected in a family mansion in the country, of retiring by themselves in the evening with the mistress of the house, leaving their husbands to converse a little longer in the drawing-room before they come to rejoin them: their modesty would be offended at being seen to enter their apartment with a man who was not to leave them till the next morning.

A smile is always on their lips, but it stops at kindness, and rarely proceeds to archness. There are a thousand things they would blush to hear: and if they ever do seek to guess their meaning, they conceal their efforts so well that it is impossible to discover them. They are never seen to maintain an opinion with heat, or discuss any question of politics or literature, although, in general, they are very well informed. Their mental accomplishments, the variety and extent of their knowledge, like their personal charms, belong exclusively to

their husbands. Before a stranger, they are silent, cold and reserved.

Society in England is thus dull and monotonous in comparison with ours. With us, the most modest woman feels herself under no obligation of preserving for her husband more than her plighted fidelity: another has often all her confidence and esteem, and enjoys the treasures of her affections and accomplishments. The graces of her imagination, and even those of her person, are the property of the circle of her acquaintance. She keeps herself pure to the man to whom she has pledged her faith, but this engagement is confined within the narrowest limits, and she claims the liberty of disposing at her will of all that comes not strictly within its bounds. In this consists the charm of French manners: the greater portion of the accomplishments of the ladies belong to community, and every one has his share, just as if he enjoyed their intimacy.

The country parts of England are tranquil and sombre: they invite to meditation. The light of the sun, which warms them but at intervals, is absorbed and not reflected: very different from the brilliant plains of France which reverberate the splendour they receive;

and open the hearts of all to gaiety and confidence. It is this happy exhilaration of the inhabitants and, I had almost said, of inanimate things, which makes France so delightful an abode for strangers, and which induces them to visit with such eagerness that land of day and sprightliness, where nature has scattered the graces, and gentleness and good humour, with as lavish a hand as she has fruits and flowers.

The English boast of possessing in the highest degree all the comforts of life. Yet, if I may be allowed to enter into such minute details, their beds are bad, their cookery insipid and limited, their beverage disagreeable, their fruit always unripe, and their vegetables without flavour. Their various apartments are unprovided with the most agreeable and necessary articles of furniture: they are furnished neither with clocks, mirrors, nor commodes. They are placed up and down stairs, upon every floor of the house, and open immediately upon the landing, without having the smallest recess by way of anti-room. Their fires throw out an unwholesome odour; and their draperies are tasteless and inelegant.* What then have they? For in truth there is some justice in their pretensions. They pos-

sess an exquisite cleanliness and neatness, which make amends for the want of all the other conveniences of life, and give to such as they have borrowed, an appearance of perfection that seems carried to its highest point of improvement.

They delight in travelling. Alas! happiness is not made for man! They have in their families and institutions all the felicity which man can attain on earth. There is nothing to offend them in civil life; the yoke of government sits easy upon them; they have to fear neither the oppression of authority, nor the scorn of birth. Every thing around them draws forth esteem of themselves and their profession. But this inalterable repose, disturbed by no sorrows but those which are attached to human nature, that repose which seems written on their unruffled and noble countenances, becomes at last insupportable. They resemble those fabulous deities who took it in their heads to travel on earth. They depart: they plunge into all the dissipation of foreign countries, they become for a season the slaves of those manners which they despise, and revel in their treacherous delights; but in the midst of all, they preserve their hearts untainted; and after intoxicating themselves with the cup of voluptuousness, they

return to their own homes, once more to seek the pleasures of purity and innocence, and strive to endure their weight.

Such are the people against whom a certain class of writers has formed the design of exciting our resentment, by attributing to them all the misfortunes that have befallen us from the mad projects of a despot: an odious and inhuman design, unworthy of the progress of civilization, but which unhappily finds in our ignorance and prejudices but too much likelihood of success. The two causes which appear to me more particularly to influence the prejudices of all classes of the French nation against the English, consist in the cruelty with which the British government treated the French prisoners during the late war, and in their Machiavelian conduct towards the nations of India. The first of these operates more especially upon the people, continually exasperated by the recitals full of hatred and revenge of the soldiers and sailors so long shut up on board the hulks: and the second upon the upper classes, who are indignant at that crafty and barbarous policy by which all means are good provided they gain their end.*

* After the glowing eulogy upon our institutions, our laws, the beauty of our youth, the modesty of our women, and the courage and patriotism of our men, the oft-refuted

I confess that, imbued, like every other Frenchman, with the idea that our nation was cordially detested by the English people, I had imagined that it was in consequence of this hatred that the English singled out our countrymen as the objects of such excessive harshness ; but when afterwards enabled to judge of their active philanthropy, I was at a loss to understand the contradiction between their unvarying efforts to mitigate the woes of suffering humanity and their barbarous conduct towards our soldiers. I have spoken to several members of parliament about it, and their answer has been, that, having no fortresses in the interior, nor place of security where the prisoners might be confined ; having moreover no police to watch them, they were obliged to send them on board the hulks, the only kind of prisons at their disposal. It is possible there may be some truth in this explanation : but this rigorous necessity, even supposing it as powerful as it is described, furnishes no reason, at least, for huddling the prisoners one upon the other out of all proportion, without regard to the disorders likely to arise from such con-

story of the ill-treatment of the French prisoners of war, would seem oddly patched in here : the present state of French feeling will, however, afford a sufficient clue to the mystery.—*Tr.*

finement; nor for condemning them to the insufferable torment of an unwholesome atmosphere and of an absolute want of exercise.*

This point is one which more particularly demands the attention of the English government. There is no other which excites against it so much and such just hatred, or which imprints on the nation, in the eyes of all Europe, a more indelible spot of barbarity. The comparison too, made between the humanity of all other governments towards their prisoners and the harshness of the British government towards theirs, furnishes ground for supposing in the English a spirit of cruelty peculiarly their own, and which has caused her shores to be regarded as fatal to the stranger as were anciently those of Tauris.

As to the conduct of government towards the people of India, it would require, to judge properly of it, a more perfect knowledge than what exists in Europe: but if circumstances can ever justify injustice and perfidy, the English government may find an excuse in the impossibility of repressing in any other manner a population of a hundred millions of subjects.

* The reader has but to look at the regulations under which the prison-ships were placed to see the extent of exaggeration and falsehood in the story carried home by the French prisoners.—*Tr.*

with twenty or thirty thousand Europeans. It is easy to be generous and great when we are the strongest, or when at least we are able to offer some means of resistance to our adversary: but what defence has the weak against the strong, unless it be in skill and cunning?

But this opinion which we have of the bad faith of the British government, is retorted in return by the English on ours with quite as little moderation. Our different national bankruptcies; the detention of the English, travelling in France for pleasure or business during the last war; the confiscation of their property; the tyranny and perfidy in our former intercourse with the powers of Europe; have made our government considered, in general, as totally divested of honour or probity. The expression of Voltaire, that we were a people *half ape, half tiger*, has produced a wonderful impression in England. The people have had the incredible folly to take the expression literally: and they look upon us precisely as a nation incapable of turning their minds to any serious occupation, intent only on trifles, and always ready to devour those who oppose their fancies. The ever-deplorable scenes of the revolution, and our complete submission to a military despotism after all our enthusiasm for liberty, unhappily have only tended to confirm

them in this absurd notion, without giving themselves the trouble of reflecting that their history, and that of almost every other people, is full of excesses and contradictions not less reprehensible. The many brilliant qualities which pre-eminently distinguish us; our amiable confidence, our easy intercourse, our impetuous courage, full of nobleness and generosity; our horror of venality and corruption, of which the revolution itself presented such convincing proofs; our graces, our gaiety, and our good humour, have failed in reconciling us to them. Judge then, by the injustice and absurdity of their prejudices respecting us, of the injustice and absurdity of ours respecting them.

Let us hasten to extirpate those feelings of hatred which have their foundation but in ignorance: let us visit and study the English, if we really wish to learn what is liberty, and we shall ultimately love them. Let us establish between them and us an interchange of knowledge, of discoveries and inventions; and make a common stock of the products of our wisdom and meditations, as we do those of our soil and industry. Already have we studied the mechanism of their trial by jury, and the plans of their new prisons: on their side, they are desirous of knowing the beautiful classification of our laws: they aim at naturalizing

the elegance of our manufactures, and at approaching the perfection attained by our artists. May this noble emulation continue! May each people gain from the other the secret of their enjoyments, their happiness and prosperity! May both be ready to offer mutually all the information that can contribute to the melioration of their laws and administration: and in this happy interchange, let us be allowed to hope that France, so rich in fine laws, in learning and genius, may not remain the debtor.

CHAPTER X.

**OF THE IMPEDIMENTS TO AN ADOPTION OF
THE PRINCIPAL ADVANTAGES OF BRITISH
LEGISLATION.**

As a continuation of this picture of the administration of criminal justice in England, it had been my design to trace that of criminal justice in France, that the reader might be enabled to compare the two systems: but as government are preparing alterations on the most important points of our criminal process, it occurred to me that the details I might enter into would now be useless, and I thought it might be more beneficial to point out the necessary reforms, and such improvements as might be borrowed most successfully from the English procedure,

I will however say, though with heartfelt regret, that whatever efforts might be made to introduce into our legal administration those noble institutions which constitute the pride and happiness of the English, and upon which both the personal and political liberty of the subject are founded, would unhappily experi-

ence insurmountable obstacles among us, not only in the prejudices that have survived the changes legally effected in the ancient constitution of the kingdom; but still more perhaps in those that are the offspring of the revolution: Our just hatred of exclusive privileges has produced in us an unjust abhorrence of every kind of superiority,* even that resulting from talents, industry, and good conduct, which every one may acquire, and which consequently is in itself a new homage to equality: We are in equal apprehension at present both of the influence arising from services rendered by our ancestors to the state, and that attendant on property: and it is thus that, from our being always disposed to exclude those whose fortune is more intimately connected with public tranquillity, and to prefer those to whom disorder may open the prospect of wealth and advancement, we can never succeed in establishing a state of stability adapted to inspire both ourselves and foreigners with confidence.

Yet after laying the foundations of a free government, in which the rights of every individual should be distinctly acknowledged and

* The tendency of opinion, in France, among the well informed, is still, it is believed, to a republican form of government.—*Tr.*

determined, plain good sense would seem to indicate that our most important concern should be that of ensuring its solidity ; and for this purpose, the more willing ought a nation to be to make some sacrifices, in proportion as the liberties guaranteed by the new form of government are indispensable to its welfare.

Now one of the most efficacious means of strengthening a government is to form a great body of individuals who, by deriving some distinguishing advantages from its institutions, may naturally become interested in their defence, and with them the rights of the people, which should make part of the same grant and charter. Liberty, in fact, does not consist in abandoning the administration of the state to the whims of the multitude ; nor in considering it as a matter of course that, by an inverse privilege, the possession of no property and no stake in society, constitutes eligibility for a public office. It consists in never being subject to the authority of the man, but to the magistrate ; in never being arrested or detained except by due course of law ; in the unrestrained profession of our religion ; in being allowed to criticise freely all the measures of government ; in paying those taxes and being subjected to those laws only, which the nation itself shall consider just and necessary ;

lastly, in being excluded from no public employment or dignity by considerations of birth or others of this kind. Wherever these principles flourish, there is liberty; nor can it be the least impaired by establishing a few slight prerogatives purely honorary, which might become a noble object of emulation among all classes of society.

It is in this spirit that the Chamber of Peers has been conceived: but this chamber can fill the object of its institution but very imperfectly, if it remains insulated in its own interest, merely, and is not intimately united with a numerous class of land-owners, which, like them, shall have its peculiar privileges to preserve, and be always ready to support it by its influence and property.

I will say more, and am going to make an assertion which perhaps may seem paradoxical, but which will appear to be just to every impartial and reflecting mind, that no moderate government, and still more, no real liberty, can exist without an aristocracy. In despotic governments, such as Turkey, or France, under Buonaparte, there is no necessity for any medium between the people and the tyrant: the sword decides every thing, and ends all difficulties. Whether in the hands of the sovereign or of the people, we must bow to the

will of its possessor, however unjust that will may be. It is quite the reverse in moderate, and especially in free governments, in which the people are summoned to the exercise of a great power. In the former, an aristocracy is necessary to the people to defend them from encroachments of the sovereign; and in the latter, it is necessary to the sovereign to defend him against popular excess: and as popular fury is more to be feared than abuse of authority in a king or a minister, so, in representative governments, an aristocracy is more indispensable than in monarchical governments.

With this view it is that an aristocracy has been preserved in England; or admitting that it has preserved itself by its own power, it is at least with this view that it has been approved and sanctioned by public opinion. Charged with the sacred deposit of the constitution, it has worthily performed the duty imposed on it. Government could never have resisted the repeated attacks of the reformers, and the jealousy, unceasingly provoked, of the inferior classes, if a sure support against popular fury had not been always found in the aristocracy: on the other hand, the people would long ago have lost their most valuable privileges, if the chief families of the kingdom had not dis-

played the same energy in supporting them against the attempts of the crown.

Now unhappily there is no kind of aristocracy in France, and we want even the elements to form one, since there are and can be no longer any great fortunes.* It follows therefore from such a state of things, that those who now enjoy that which constitutes the object of the desires of the poor, the present occupiers of the soil, of power, honours and dignities, see themselves, as it were, abandoned without defence to the first attacks upon them that might be caused by the slightest unforeseen circumstances, such as war, famine, or some plot, planned with skill. In such a juncture, there is no power residing in the constitution itself of the political body which could give confidence to government: it would be compelled to seek its support in the ordinary array of a military force, and should this support fail, it would find itself deprived of every other means of checking the disorder. Yet who would have thought that in this consump-

* I cannot regard, indeed, as the sufficient elements of an aristocracy, the power granted to titled persons of creating *majorats*: such persons having the right to attach to these majorats only property of a fixed income, and absolutely disproportioned to the expense necessary to give importance to their rank.

tive state of authority, in this absolute deprivation of all reasonable influence over the nation, there should exist a certain description of men, pretending themselves friends of the common weal, seeking to augment still further in the hands of the people the means of action against the government. Fools! who before opening a new channel for the torrent, do not begin by forming the banks within which its fury is to be restrained, and who would expose to certain devastation the fields it was destined to adorn and fertilize.

When I say that fortunes no longer exist in France, I do not mean there are none who are not, for a time, possessed of considerable property; but I term fortunes none but such as are hereditary in families, and by their perpetuity naturally give birth, in favour of their possessors, to a sort of public respect which soon becomes their most valuable enjoyment, and which may be made to contribute so successfully to the maintenance of good order. Now, there not only exist no such fortunes in France, but our laws of succession are a perpetual bar to their ever being established, and in this point of view I regard them as subversive of a representative government. Every species of property is at present confounded in a sort of lottery, in which every one flatters

himself with one day obtaining a prize; and at the owner's death all return into the wheel of fortune and again become the expectation of another.* Popular regard can therefore find no motive to attach itself to him whom chance may have blessed with a lucky ticket; envy, on the contrary, pursues him with her most envenomed shafts, and he becomes almost the object of universal hatred.

The instability of government is not the only misfortune resulting from such disastrous laws. Family union is dissolved; the old age of parents is embittered; and the country is daily stripped of all its ornaments. The division of the property over, the family is broken up, brothers separate with their paltry portions, no interest brings them again together, and in the cares and troubles of their own private share, they mutually forget one another. Instead of the venerable manor-house, in which, by virtue of the system resulting from the law of England, every member of the family during a portion of the year joins its head, the possessor of the common inheritance; instead of the regard which this inheritance, transmitted perpetually from generation to generation, attaches to the

* What havock would such a system make in England!
—Tr.

name of its possessors, and of which the splendour extends over all their descendants ; every one lives insulated, unknown, and, as it were, a stranger in his own country. Children having no interest in remaining with their parents, abandon them, one after the other, and leave them in a state of desolation : their expectation being confined but to an equal and therefore moderate share of the paternal property, they separate and disperse to seek abroad their livelihood.

Agriculture also inevitably feels the effects of those multiplied sales to which most heirs are obliged to submit, in consequence of the impossibility of dividing the estate. This afflicting thought checks every inclination to make improvements in the proprietors of rural property. Why should they strive to adorn estates that are to pass, when they are dead, into the hands of strangers ? For whom are they to set about making roads and drainings ? For whom form plantations, when unable to say, like the old man of La Fontaine, *My remotest posterity will be indebted to me for this shade ?* What sweet and cheering reflection would sustain them in labours of which age opposes their gathering the fruit ? They therefore confine themselves to such repairs as are indispensable : those parts of the building not

inhabited are suffered to fall into decay; and it is thus that by degrees all those beautiful and noble mansions which adorned our hills, will disappear from our landscapes; and that our plains, parcelled out by perpetual divisions and sub-divisions, will soon present no prospect but flower and kitchen gardens.

Our present flourishing state of cultivation would appear, it is true, to reject such melancholy anticipations: but is it to our new laws of inheritance that we are necessarily to attribute it? Assuredly agriculture in England is not less flourishing than in France; it is even generally admitted as being there carried to a higher pitch of perfection: and yet almost all estates are transmitted, as I have before said, in the order of primogeniture: whence it may be concluded that it is not in the abolition of the right acquired by priority of birth, and in the mode substituted for it, that we must seek the true cause of the meliorations which we flatter ourselves with perceiving.

May not the cause be found rather in the turn given to men's minds by the revolution? in the shackles it has broken; the prejudices destroyed; the fortunate innovations introduced; the abolition of fallow grounds; the creation of artificial meadows; the importation of Spanish sheep; and above all, in the trans-

ference to active and industrious hands of the vast number of estates hitherto neglected by their indolent possessors? But who can tell to what point of perfection these same elements of prosperity might have been carried, if, instead of being thrown by chance into the hands of those who are too poor to improve them, they had fallen to families furnished with the requisite means for their development? It is not till all the causes of improvement which I have just adduced shall have produced their full effect, that the fatal consequences of the unlimited sub-division of the soil will be perceived. At present all perhaps goes on in daily increasing prosperity: but when the benefits of the new laws shall be quite exhausted, when the price of commodities shall be fixed by the highest amount of produce, or a new class of consumers arise to enjoy them; then will the action of the destructive system of the equality of division begin likewise to be felt, and I doubt not that, for the interest of agriculture itself, a remedy will be sought against it.

But if our new laws and customs oppose the establishment of any great landed fortunes, and deprive the government of their support against public disturbers; the prejudices preserved by the old nobility are equally opposed

to the foundation in France of a truly national aristocracy, which might one day become the twofold object of royal regard, and of the people's respect and gratitude.

The pretensions unceasingly manifested by the old nobility are absolutely incompatible with the principles of our new government, principles as legitimately introduced into the constitution of the kingdom as those they replaced. In vain will sophistical writers seek to trumpet forth the advantages formerly derived by the nation from the privileges of the nobility, and the facility possessed by commoners of becoming part of their number; *when they had acquired by their industry sufficient wealth to quit the labouring and governed class, and enter into the independent and governing one.* No one can be led astray by such mockeries. Every body knows that it was a constant maxim with the nobility that the King could make every thing but a gentleman. This maxim was a very just result of their self-attributed origin; and it is indeed certain that with all his power the King could not transform the descendant of the vanquished and enslaved Gaul into the descendant of the victorious Frank. This miracle was beyond the power of God himself. Seated on this rock, inaccessible to the efforts of the profane, the

nobility of France had the assurance to perpetuate in all ages this afflicting spectacle of conquest, and to present continually to the minds of their vassals, the unhappy period when their fathers were trodden under foot by barbarians, stripped of all their lands and compelled to cultivate them for their new masters. To prevent these proud remembrances from being lost by time, they refused to recognize, as forming part of their body, men the most esteemed for their services and talents, whom the King presented as worthy of admission among them. Neither the splendour of their dignities nor the importance of their office could obliterate the indelible stain of birth: and the pettiest gentleman, if invited to dine with the first president Molé, would have whispered in secret what Marshal Biron said openly, in all the pride of ancestry: “ I am going to dine to-day with the first bourgeois of Paris.”

These pretensions might have been suffered at a time when the nobility alone composed the whole nation, and the rest of the inhabitants were looked upon merely as the tools of agriculture or trade. But when at length the furrows of the soil brought forth soldiers; when ignorance, placed by the nobles in the number of their privileges, forced them to have

recourse to the knowledge of their serfs, whom they esteemed a race as justly devoted to the toils of the mind as the body; when, as the result of these new relations, the villeins acquired in their turn titles and employments; when, like the nobles, they had property to defend and rights to preserve, and became, like them, interested in the good administration of public affairs, how could the nobility expect any longer that they should continue to support such insulting pretensions? and how, after becoming so inferior in strength to the other classes of society, could they persist in exhibiting themselves in the attitude of a conquering body? Ought they not to fear lest the conquered, rendered warlike in their turn, should ultimately perceive their own strength, and seek, too, by the aid of their arms, if not lands and slaves like the savage companions of Pharamond, at least an equality of rights and a participation in the same advantages?

The aristocracy required by our government to defend it against popular power cannot then be founded on such principles. These indeed must be for ever banished, or else the nobility, instead of being useful to the government, will become the source of its greatest danger, by rendering it liable to be included in

the hatred they cannot fail to draw down upon themselves.

Ideas of equality are now too universally disseminated to permit the imposition of any other kind of superiority than what appears established for the general interest: and the institution of a nobility especially cannot hope to overcome the repugnance to which it is peculiarly subjected, except so far as it shall be regarded as a magistracy necessary for the maintenance of public order, and as the means of rewarding services to the state, or of perpetuating the recollection of them. Let it then cease to form a *cast* in society: it is indispensable that it be accessible to every individual, and constitute the aim of the noblest ambition: and as there is no necessity in a family that more than one of its members should exercise the magistracy with which it is invested, or represent the great captain, the statesman, or the scholar it has produced, and whose memory it appears useful to preserve; so is it sufficient that the eldest alone should be ennobled; and there is no reason why the rest of the family should arrogate the smallest distinction, and be exempted from sinking indiscriminately into the great body of the people. Such is the kind of aristocracy that should

now be created in France, and without which it is impossible to grant the people, if we wish not to be exposed to the greatest peril, all the rights which flow indirectly from the constitutional system.

The aristocracy, in England, preceded liberty, and hence it is, that liberty, repressed in its licentiousness, has ultimately settled down without producing disorder. With us, on the contrary, where the whole edifice was totally overthrown, we began by elevating the democracy; and this, finding no obstacle to its progress, now threatens all with invasion.

The misfortune is that a single moment is sufficient to establish a democracy. A law conferring rights on the people which they had not, becomes that very instant in operation, and produces its immediate effect by the sudden possession which the people take of their new power. Not so with an aristocracy: a plant which time alone can strengthen, and requiring the revolution of ages to extend its roots. It should be our part to nurse it in a hot-house.

In what condition should we now be if, as in England, all classes were allowed to meet in such numbers as they pleased, to present their petitions to the two houses; if the people had the nomination to almost all offices of local

administration ; if they were summoned as it were in a body to the elections ? What should we have to oppose to all the excesses into which they might be hurried by disturbers ? Where would be those justices of peace so respected in their counties ; those youthful constables who, armed with no weapon but a simple staff, rush into the midst of the tumult ; those dauntless juries who would punish the guilty ; those representatives named by the influence of the great landed proprietors, the immoveable supporters of their acquired rights ? Who, on the contrary, could foresee the consequences of the first tumult ?

Let us hasten then to establish an aristocracy if we wish for liberty. Let us form families whom the interest of their influence and patronage may fix in their own provinces ; strip them, for their own sakes, of those rights which may excite public animosity against them ; and grant them other privileges which may perpetuate their influence, and give them strength to struggle, at election-time, against the genius of envy and disorder.

The only way of attaining this grand object is to set apart for the eldest son of each family, titled or not, a larger portion of the real estate than for his brethren. This portion ought to be two-thirds, in order that with his

wife's dowry he may be enabled to purchase the share of his younger brethren, and thus preserve in his own hands the entire property of the paternal inheritance: but with respect to the house of peers, where the fortune of each peer and its attendant independence, as well as the honour thus thrown over the peerage generally, form as it were a part of the nation's rights, all the lands attached to the peerage ought to be unalienably entailed in favour of the eldest son, and the younger ones should be confined to a distribution of the moveable estate, or the immoveables independent of the peerage, or to a sum of money which should never exceed one year's income of the real property.

Then might we have our commissions of peace upon which government could throw almost the whole burden of local administration; our grand juries, sheriffs, special constables, and popular elections. All classes might then be permitted to meet to discuss their own interests, frame petitions, and appoint their officers. Then, indeed, all those rights which the friends of liberty grieve at not yet seeing acknowledged and established, might be so without danger to the security of government; and no longer would there be room to suspect the secret intentions of those who are now so ardently demanding them.

CHAPTER XI.

OF THE PRINCIPAL ALTERATIONS TO BE MADE IN OUR PRESENT JURY LAW.

ALTHOUGH the causes just explained prevent us from giving our criminal procedure the full perfection of which it is susceptible, I will yet endeavour to explain as briefly as so extensive a subject will admit, the most material abuses contained in it, and suggest appropriate remedies.

The most usual reproaches cast upon it are the arbitrary prolongation of the examination and secret imprisonment, and the power given to the prefects of making out the jury lists: but what a number of more serious objections does not this system present to the eye of the experienced observer!

Before placing these in their full light, it appears to me necessary to lay down a few data which seem to form the indispensable foundation for every law on this subject.

First, that the instruments of the process will never produce complete and perfect confidence unless the power of framing them shall

be confided solely to members of the judicial order, or to independent magistrates; all concern with them being taken out of the hands of the military and government agents.

Secondly, that judgments will be the more respected in proportion to the more active part allotted to the nation in the administration of criminal justice; and consequently that the nation should be entrusted with every branch of that administration requiring no peculiar knowledge.

Thirdly, that there is a description of evidence which it is better to renounce, than obtain by means repugnant to morality and humanity.

The inference from the first principle is that the gendarmerie shall have nothing further to do with the examination and indictment.

Let the gendarmerie seize an individual caught in the fact; take him before the magistrate; secure the instruments of the crime found on the spot; write down the names of the witnesses; and make a report to the magistrates of all they have seen or heard; these are operations calculated to excite no one's suspicion: but this is not the case with regard to the interrogatories to which in certain cases they are empowered to submit the prisoner

and the witnesses; and there are well founded reasons for fearing lest some of them, from an excess of zeal or the desire of promotion, should be occasionally tempted to use unlawful means to obtain more precise declarations than might have been made voluntarily.

Prefects, too, being the paid agents of government, ought to be interdicted from every kind of interference in the administration of justice; and for the same reason, police commissaries should no longer be empowered to take an examination, except in cases only, where no examining magistrate, justice of peace, mayor, or deputy mayor, should happen to be on the spot.

The second principle is that which has given birth to the institution of the jury, in the early stage of which it belonged at first to the public, to decide whether there existed presumptive evidence sufficient to send the prisoner to trial, and afterwards to decide as to his guilt.

The latter of these two privileges, although strongly attacked on the discussion of our existing code, by men seduced by the hope of participating in the despotic authority then establishing, resisted their efforts: but the former, the advantages of which had not perhaps been generally and sufficiently appreciated,

sunk under the assaults made on it; and the right of accusation was transferred to the royal courts.

The principal arguments alleged at that time against the jury of indictment were reduced to these: the difficulty experienced by the jurors in ascertaining the weight of presumptive evidence against the prisoner, according to a process still incomplete; the ascendancy which they had permitted the directors of the jury to have over them; the ignorance of almost all of the design of their meeting, an ignorance from which it resulted that they thought an admission of the charge was followed as a matter of course by the conviction of the prisoner; and lastly, the seductions to which they were more particularly exposed.

Nothing, I think, was more easy than to destroy the causes of such unhappy results: but instead of frankly seeking a remedy for them, the love of power and arbitrary superiority, which had then seized upon men placed in great public situations, induced them to exaggerate faults which had been committed, and to seize with eagerness the opportunity which they presented of overthrowing a popular institution.

According to the system at that time established, there were as many grand juries as

districts, that is, three or four in each department: these grand juries met once or twice every month, to the number of eight, making for each district sixteen jurors, monthly, and consequently, a hundred and ninety-two every year; and for each department about seven hundred and sixty-eight yearly, or at least three hundred and eighty-four, supposing only one convocation of the jury every month. Further, the grand jurors were taken indifferently from the general jury list of the jurors of the department; and this list was itself composed of those considered proper for the duty by the authorities of the department. Lastly, they were directed in their operations by the president of the correctional tribunal of the district, under the denomination of director of the jury: and it was thought sufficient to make them acquainted with the complaint and the written declarations of the witnesses.*

It may be conceived that a jury composed in this manner might really be deficient in the requisite information to discriminate between weighty presumptions and positive proofs, or to perceive how far certain presumptions were susceptible of being strengthened at the trial; it may further be conceived that they might

* Law of the 7th Pluviose, year 9.

form an incorrect idea of the design of their institution; and that, having before them only written declarations, they were not in a condition to comprehend their full weight. Lastly, it may be conceived that, being assembled in the district where the crime was committed, they were exposed to all the solicitations of the relations or friends of the prisoner; and that being directed by a superior magistrate, it was possible they might too easily give way to his influence.

But if, as in England, none but the most distinguished of each province had been summoned for the duty; if the grand jury, instead of being convoked in each district, and composed of jurors belonging solely to the district, had been called together in the chief town of the department, and composed of jurors belonging to the whole department; if they had heard the plaintiff and witnesses in person; if they had been left to their own understanding; then all those charges of ignorance, seduction, and servile deference to the opinion of their directors would have been without foundation; and the grand juries would have attained the object of their institution.

It was besides easy to re-animate the zeal of the public for this kind of duty, by lightening its fatigues, and by assembling those juries

only at assize time. In this manner, by raising the number of jurors to double or even triple that fixed by the old code, that is, to fifteen or twenty-five, instead of eight, there would have been no necessity for more than sixty or at most a hundred every year, instead of seven hundred and sixty-eight, or three hundred and eighty-four: and this period of convocation would have offered a further advantage of taking from the jurors one of their most frequent motives of weakness, I mean the fear of retaining the prisoner in gaol during the interval between the accusation and the trial, a fear which would no longer have existed if the trial had immediately followed the accusation.

The same motives which caused the admission of the jury of trial demand also the establishment of the jury of accusation. If, by the jury of trial, it was designed to place individuals out of reach of unjust convictions under which violent and revengeful ministers might seek to overwhelm them, there is the same reason for protecting them, by the jury of accusation, from the vexatious prosecutions which they might be tempted to institute against them. There is danger too, by separating the power of accusing from that of trying, of causing an unpleasant contest between the

courts and the jurors, that is, between the magistracy and the people, a contest which could not fail to weaken the respect of which the magistrates have an indispensable necessity in the exercise of their duties.

Let us not however imagine that by selecting for the future our jurors of accusation from the most elevated classes of the department, we shall have grand juries constituted like those of England: assuredly not: we shall still be far from that beautiful institution; we shall have juries of accusation, but nothing more: it is only by the revolution of ages, and when we shall have the courage to alter our laws of succession, that we can hope to see our juries of accusation become, like the grand juries of England, provincial senates, watching over the internal tranquillity of their counties, the maintenance of the roads, and public buildings, the distribution and employment of their rates, the mode of their administration, and over all their interests and wants.

The third principle before announced, applies to the question, whether the prisoner ought to be subjected to any interrogatory.

Tormented with the desire of knowing the truth, which the prisoner is always interested in concealing, every means appears to us good that may discover it; and it is not long since

torture had its defenders. Our manners being insensibly softened by the irresistible progress of the arts and sciences, we have acknowledged the barbarity of that terrible instrument; and we have renounced the use of it in the very case where there was no other way of obtaining evidence against the prisoner. But this is the single concession we have yet brought ourselves to make to the urgent entreaties of philanthropy: and we have retained against the accused the rest of our ancient rigour. We allege, in excuse, that public tranquillity cannot be maintained unless the guilty are prevented from escaping the penalty they have incurred: and we think, consequently, that nothing ought to be neglected to render their punishment more certain, and that we should by no means deprive ourselves of the aid of the interrogatory, the most irresistible of all the means of conviction. We think, besides, that every individual owes an account of his conduct to the magistrate, when he becomes an object of suspicion; and that none but the bad would refuse the explanations demanded. We therefore make no scruple of detaining a prisoner in gaol so long as any hope remains of obtaining evidence of his guilt; of preventing him from holding any communication; pressing him with questions; surrounding him

with snares ; precipitating him into contradictions ; and of offering him a thousand various baits to induce him to acknowledge his crime.

To give an idea of the sort of earnestness with which these interrogatories are made, I have thought proper to cite one which came into my hand in one of the causes I had to examine.

It was the case of stealing a watch and some articles of plate ; the prisoner denied the charge, but the jury afterwards found him guilty.

The following are the questions put to him by the examining magistrate, with the prisoner's answers.

MAGISTRATE.

“ Your evasions as to the period of your
“ leaving M and as to the time when
“ you said you had the silver watch in your
“ possession, together with your lie to the jus-
“ tice of peace, leave no room for doubting
“ that what you say is false, and that your ob-
“ ject in concealing the truth is to clear your-
“ self of the robbery with which you stand
“ charged.

PRISONER.

“ What would you have me answer ? I did
“ not commit the robbery.

MAGISTRATE.

“ Is it not true that, after getting into the
“ house of Mr. A., you opened his closet, and
“ forcing the drawer, took out the articles now
“ shown to you?

PRISONER.

“ I did not get into Mr. A.’s house, and I
“ did not take the articles of plate now shown.

MAGISTRATE.

“ Besides the plate now shown, did you not
“ take a silver time-piece and silver cups?

PRISONER.

“ I took neither watch nor cups.

MAGISTRATE.

“ Did you not also take a sum of ——
“ wrapped up in a white canvass bag, and
“ consisting of, &c.

PRISONER.

“ No.

MAGISTRATE.

“ Did you not conceal the plate under a
“ mound of earth?

PRISONER.

“ Since I didn’t take it, I couldn’t hide it
“ there.

MAGISTRATE.

“ What instrument did you use to open Mr.
“ A.’s closet ?

PRISONER.

“ I am not a thief to open any body’s closet.

MAGISTRATE.

“ At what part did you gain entrance into
“ Mr. A.’s house ? Did you not leave it by the
“ barn-door ?

PRISONER.

“ I got in neither on one side nor the other,
“ and therefore could not have left it by the
“ barn-door .

MAGISTRATE.

“ Was it not from the apprehension of a
“ search warrant that you hid the plate under
“ a mound of earth ?

PRISONER.

“ I had no apprehension of a search warrant.

MAGISTRATE.

“ A few days after the robbery did you not
“ wrap up in a bit of paper some of the
“ pieces of gold that you had taken, and
“ throw them into the fore-court of Mr. A. ?

PRISONER.

“ I was at no pains to throw them there,
“ since I never took them.

MAGISTRATE.

“ You were assuredly not the only one
“ concerned in this robbery: if you have any
“ accomplices, name them.

PRISONER.

“ I am at the head of no gang of thieves to
“ have accomplices.”

It is in this inquisitorial spirit that all our examinations are generally made, and in which even our trials are almost always conducted. Ought this sort of moral torture to be any longer tolerated? Are not its advantages overbalanced by its inconveniences?

I acknowledge that the questioning of the prisoner is often of very great service in coming at the truth, and I will even confess that it is perhaps the most efficacious means of discovering it. But if this reason be a sufficient justification of the practice, may not as much be said of the torture, of that at least which was not applied to the culprit till after conviction? It is merely a timid subservience to the opinion of the age that can make the partizans

of the system of questioning reject this dreadful consequence of their doctrine ; but if afraid to encounter the whole odium of it, they at least adopt the less revolting utility of captious questions, false suppositions, and all those insidious manœuvres which they conceive sanctioned by the interests of truth.

Besides these extremities to which we are inevitably led by the principle on which the questioning of the prisoner is founded, it nevertheless appears to me easy to show, even supposing it conducted with all possible good faith and mildness, that it is immoral, inhuman, and sometimes dangerous.

It is immoral, because always the result of surprize and ignorance.

Is it not in fact, certain, that if the prisoner could have foreseen the consequences which would be drawn from his answers, he would either have answered differently or not at all ? It is then to his inexperience and simplicity that we owe the information obtained as to his guilt, and we should have remained in the uncertainty in which we were respecting it, had he possessed more ingenuity, more craft, or more foresight. Upon what grounds too, can we dispute his right of remaining silent to all the questions put to him ? Can we reasonably expect him to come and denounce himself ?

Does it not belong to the public to prove all the charges against him? Is he to assist them in an investigation of which the object is his own conviction? And further, is not his defence even of a just accusation part of the law of nature? What would you do were all the prisoners, more enlightened as to their true interests, to resolve upon keeping strict silence? What means could you employ to make them speak? Then why not always do that which you would be obliged to do in such a state of things?

I speak not of the indispensable necessity in which the prisoner finds himself, of heaping falsehood upon falsehood to save his own life; a ready answer is at hand to this objection, that the innocent need no recourse to this disgraceful extremity; and that as to the guilty, it is ludicrous to take so much care of their conscience after the crime they have committed.

I say further, that the practice is inhuman. What indeed can be more barbarous than to force a wretch to betray himself, and to whet the dagger that is to pierce him? What! you refuse to receive depositions of the father against the son, of the wife against the husband, of brother against brother, and you entreat, you beg, you demand that of a man

against himself! What deplorable inconsistency!

Lastly, it is dangerous. What reliance, in fact, can you place in answers forced from a prisoner, at a time when his reason may be impaired by the shame of his situation, or by terror from the surrounding solemnity? Yet how much have we to fear lest these casual answers should produce an impression unfavourable to the prisoner on the minds of the jury? How injurious moreover to his cause, if found in opposition to the facts proved by the ulterior depositions?

Experience informs us that a prisoner convicted of falsehood always appears guilty in the eyes of the jury. Yet how often may it happen that he will betray the truth merely on circumstances that are foreign to the case in hand, either from distrust of the question put to him, or from the fear of endangering the character or interest of a friend?

All these reasons induce me to think that the interrogatory ought to be abolished, and that, as in England, no question ought to be put to the prisoner, except that of guilty or not guilty of the crime alleged. This question is so plain, and indicates its object so distinctly, that it is impossible for the prisoner to misunderstand it, and answer it affirmatively, unless

well aware that there exist irrefragable proofs against him.

But though the motives which demand the abolition of the interrogatory admit of no compromise, it were however to be wished that a distinction could be made between the interrogatory at the examination, and that at the trial.

With respect to the latter, all the inconveniences just specified are found with many others, which it will be the object of the remainder of this chapter to point out, and it is important to extirpate them as promptly as possible; but as to the former, I confess that, with the exception of the case of a prisoner caught in the fact, it does not appear to me possible without its assistance to frame an indictment. There is often nothing but the interrogatory of the prisoner which can furnish the elements of it, and point out to the magistrate the witnesses who can give the required information. To abolish this interrogatory, is almost to declare an impunity for all crimes to which there may be no eye-witnesses.

I am well aware that my own arguments might be here retorted on me, and I frankly confess that it would be more consistent to exempt the prisoner altogether from the interrogatory: but if the interest of society seems to

require a slight departure from the rigour of the principles in the first stage of the proceedings, I shall at least urge that the interrogatory undergone at this period by the prisoner ought to have no other operation than to furnish the magistrate with the means of drawing up the process; and I think there ought to be an express prohibition against his reading it to the jury, to prevent their verdict being grounded on the answers drawn by the skill of the magistrate from the inexperience of the prisoner.

Thus, then, to recapitulate the alterations which an application of the principles laid down at the beginning of this chapter would produce in the present forms of criminal process, and those of which a bare enunciation will be sufficient to make their necessity apparent, I will say that it appears to me requisite:

1st. To limit the duties of the gendarmerie to the arrest of the prisoner, and the seizure of the arms and other proofs of guilt found on the spot.

2dly. To take from the prefects * the right of framing or requiring any of the acts of the indictment.

3dly. To prohibit commissaries of police

* An especial regulation would be necessary for the police of Paris.

from subjecting witnesses and prisoners to any interrogatory unless no examining magistrate, justice of peace, mayor, or their deputies, should be on the spot.

4thly. No longer to empower examining magistrates to issue warrants of apprehension when the charge can be followed only by a punishment from the correctional police.

5thly. To fix the time during which the magistrate shall be allowed to detain the prisoner in secret confinement, and the period within which he shall be obliged to confine his examination: with the reservation of his being permitted, in extraordinary cases, to make application to the tribunal of first instance for an extension of time.

6thly. To order that, in cases where the crime incurs but a slight punishment, the prisoner shall be left or placed at liberty, if able to procure the security fixed by the tribunal, according to the circumstances.

7thly. To re-establish the jury of accusation.

Let us now pass to the particular abuses in the proceedings before the court of assize; and to bring them out the more prominently, allow me to make a rapid sketch of the trial.

In the existing state of things, then, the president begins by subjecting the prisoner to a long examination similar to that related just

before. He afterwards hears the depositions of the witnesses ; the attorney-general supports the accusation ; the prisoner's counsel maintains the innocence of his client ; the president recapitulates the evidence, and the jury withdraw to deliberate.

Let us now follow the order of this proceeding step by step, and we shall be struck with its defects.

The president questions the prisoner . . . Who is the president ?—a member of the royal court which has placed the prisoner in a state of accusation ; a colleague of the attorney-general or officer who supports the accusation : finally, a magistrate charged with detailing the proofs of it to the jury ; the honour of the body to which he belongs, his connections with the accuser, the interest of his own reputation, every thing induces him, imperceptibly, if not to hope for the success of the accusation, at least to fear lest some of the proofs upon which it is founded, should escape the inexperience of the jury.

He questions the prisoner ! We have seen how severely : persuaded almost the whole time of the certainty of the crime, his object is to draw an absolute confession from the culprit : he presses, twists and turns him, scarcely allowing him time to breathe ; and if the pri-

somer manifests an insuperable resistance, he becomes angry and exasperated, and almost his enemy.

He hears the witnesses! . . . After the hearing of each witness, fresh questioning of the prisoner, fresh falsehoods on the part of the latter, and still increasing animosity in the judge.

The attorney-general supports the charge! . . . Here it is that the harsh and inflexible custom of our old criminal courts has been unhappily preserved in all its frightful energy. The prisoner is not yet convicted, and he is already treated as if the crime were proved; he is loaded with the most insulting epithets, and I have sometimes seen him browbeaten in the most shameful manner. A slight incipient reform has been introduced on this point at the bar of the royal court of Paris: but the barbarous usage is still general throughout France; it forms part of our judiciary system, is transmitted from magistrate to magistrate, and degrades our national character in the eyes of a foreigner.

The prisoner's counsel maintains his client's innocence! . . . This defence presents an abuse not less dangerous and revolting. To prevent a conviction for the most palpable crimes, we see young barristers, of gentle man-

ners, unblemished integrity, of pure and inflexible principles, throwing doubt on the most irrefragable proofs ; fabricating suppositions devoid of all probability ; laying down maxims subversive of morality and social order ; infusing guilty terrors into the simple minds of the jurors, and deriving a vain and empty joy in having snatched a scoundrel from due punishment.

Sometimes, to crown all, the attorney-general replies, and the counsel answers him. Fresh vehemence on both sides. The court becomes a perfect arena, where the passions have full play ; exaggeration is pushed to madness, and the prisoner's life is disputed with a fierceness which disgusts the spectator and makes the stranger shudder.

The president sums up the case! A recapitulation ought to be an impartial exposition of the charges against the prisoner and of his grounds of defence : but is it in fact so ?—unhappily, we are forced to acknowledge that it is but too often a tissue of fresh arguments against the prisoner, the extravagance of whose counsel sometimes, it is true, reduces the president to this sad necessity : but it often happens that the resentment which he himself has retained during the course of the trial, acts involuntarily on his mind, and induces him,

without his suspecting it, to insist more forcibly on the proofs of guilt, than on the arguments urged by the prisoner in his favour.

Finally, the jury withdraw to deliberate. . . . These endless deliberations of the jury are still the object of my astonishment. It is necessary to have witnessed the promptitude with which the jurors of England frame their verdict, to have a full idea how far short ours are in forming a right notion of their proper functions, and make us sigh over the inextricable embarrassments in which the law has entangled them.

Instead of simply asking them the result of a conviction which they ought to have formed during the progress of the trial, they are sent to their room with a heap of useless documents, the certified statement containing the circumstances of the offence, the interrogatories of the prisoner, the indictment, and a series of questions relative to each defendant: Burthened with all these papers, they think themselves in duty bound to read them, comment on them, and draw their inferences; the ingenious discuss, discriminate, surmise, and refine on the counsel: time flies, impressions weaken, conviction flags, uncertainty creeps in: and upon the most simple and evident questions, sometimes even upon confessions, the

jury while away whole hours in useless deliberations, that are followed by the most deplorable effects.

The difficulty of making up their minds even upon the existence of the fact is however but the smallest of their torments. They now open the penal code, to see what punishment is the necessary consequence of their verdict. Nurtured with the fruit of this pernicious tree, they become the prey of new anguish. Shall they be the tools of the legislator's barbarity? Visit the culprit with the punishment that appears to them out of all proportion to the crime? Load their conscience with the cries of a wretch groaning in chains he has not deserved? Should they not rather belie the truth? What choice may they dare to make between injustice and perjury? They summon to their aid all the force of reason, all the sensibility of their hearts: at last, pity triumphs, the man decides, and the juror vanishes.

Such is the true and unvarnished picture of our process of administering justice: a presiding judge exasperated against the prisoner, an attorney-general treating him as convicted before the verdict, a counsel scandalizing the auditory by the promulgation of doctrines the most pernicious; a weak and wavering jury, not daring to deliver their verdict, and forced

to belie their own conscience; lastly, proceedings so procrastinated, perplexed, and wearisome, that they shock the good sense of the judges, and infuse into the jurors an invincible repugnance for their functions.

I am aware it may be said that these abuses proceed wholly from the inexecution of the law, which makes it a duty in the presiding judge to be impartial, and *to sum up the case to the jury so as to point out the chief evidence for and against the prisoner*; which gives no authority to the attorney-general but *that of producing and dwelling upon the evidence in support of the accusation*; that in article 314, it is prescribed that counsel shall *say nothing against their conscience*; and lastly, that the jury are forbidden *to take into their consideration what may be the consequence of their verdict on the prisoner*.

But what could be expected from these barren recommendations of the framer of the law against passions which he himself had contrived to excite in the mind of the judge, of the defendant's counsel, and the jury, by the strange situation in which he had placed them? How could he expect a president to be impartial, by charging him with establishing the accusation? that the attorney-general would be always temperate, by making it his

duty to urge arguments in support of it? that the prisoner's counsel would be scrupulous in his means to save the life of a wretch who had placed his last hopes in him? and finally, that the jury would refrain from taking into their consideration the punishment applicable to the prisoner, when such must be the *necessary consequence* of their verdict?

The evil consists then in the very constitution of the judicial system, and it is only by a total change that we can hope to root it out.

But after the failure of so many successive plans of improvement, who will have the hardihood to come forward and say to the nation: Hitherto you have had only a barbarous system of administering justice, which has presented to the prisoner not judges but enemies; your courts resound with the voice of hatred, or the promulgation of principles the most pernicious to public morals; your juries find the freedom of conscience bound in chains by your implacable laws; and perjury is their only resource against injustice. Lay the axe to this system of oppression and bad faith; abolish the interrogatory of the prisoner, and the special pleading of the counsel both for and against him. No longer charge the presiding judge with establishing the accusation, nor compel your juries to belie their conscience

by making the extent of the punishment depend on their verdict.

From all sides would burst a thousand voices to drown the audacious innovator's. What! deprive society of the most efficacious means of establishing the culprit's conviction; take from the latter the right of making his own defence; and give the judge the arbitrary power of dispensing the penalty?

Calm your apprehensions of such calamities. I forbear repeating what I have already said respecting the abuses consequent, generally speaking, on the interrogatory of the prisoner, especially that to which he is subjected at the trial. I think the motives before alleged authorize me in saying that society should elsewhere seek its proofs against the prisoner. . . .

With respect to the defence made in his name by his counsel, are any ignorant of its inutility to the elucidation of the truth? I appeal to all who have acquired any experience on this point. Its operation is doubtless fully efficacious towards the prisoner's acquittal; but it is precisely this consideration which demands its suppression. The prisoner is himself sufficient to explain the circumstances that appear to criminate him; he is well able to dissipate all doubts and establish his innocence; it is not in this respect that the advo-

cate often benefits his client; but by surmises skilfully created, by the objections with which he bewilders the inexperienced minds of the jury, and the alarm caused in their timorous souls by his perfidious eloquence.

All the true elements of a verdict in criminal cases are within the reach of the most simple; when left to act according to their own unbiassed judgment: no aid is requisite to perceive whatever uncertainty or contradiction there may be in the evidence, and their own conscience and good sense will be found unerring guides. These arguments for security are already great: but add the power left with the prisoner of making to the jury whatever observations he may deem necessary to his defence, the constant disposition of the latter to an indulgence sometimes even carried to excess, together with the additional elucidation they may receive in the recapitulation, henceforth to be impartial; and it will be hard indeed to think that the life of the really innocent can ever be endangered.

By renouncing the aggravation which the prisoner commonly heaps on his head by the falsehood of his answers, and that of the pleading of the attorney-general, which ought necessarily to share the same fate as that of the defendant's counsel, much more is accom-

plished in favour of the prisoner, than injury received by a suppression of his defence: and every one must perceive that the effect of this new system would be to mitigate greatly the hardship of his situation.

It is still further in behalf of the prisoner that I should like to see the presiding judge take no part in the development of the accusation, and would have the examination of the witnesses placed in other hands. Why not leave it to those who are especially charged to establish the guilt or innocence of the prisoner, I mean the advocate-general or the defending counsel? By this means no feeling of prejudice could steal into the president's mind. An indifferent spectator of the proceedings, he would become, as it were, the first juror in the case, the juror by excellence, on account of his acquaintance with criminal matters. He would maintain order during the trial; see that the witnesses were left uncontrolled, and exempt from insult; watch over the elucidation of all the circumstances of the cause; and his explanations afterwards would reach the jury, unimpassioned, temperate, and divested of every species of resentment.

As to the jury, who does not perceive the impossibility they will always labour under of freely enouncing their opinion, so long as the

punishment shall remain the necessary consequence of their verdict? What inconvenience then could the legislator experience in giving judges the right of modifying it according to the circumstances of the case? Is there not an inconsistency, after so far mistrusting their rigour as to take from them the right of finding the existence of the fact, to mistrust still their indulgence, by refusing them the power of diminishing the punishment? Will not the interest of truth at length triumph over the unjust prejudices still preserved against the magistracy?

The more we desire to see the verdict of a jury pure and unbiassed, the more latitude ought we to leave the judge in mitigating the penalty, in order that the jury may not be alarmed at a minimum they might still think too severe. It appears to me therefore necessary that the judge should have the power of diminishing the punishment at least two degrees, which would be productive moreover of a great advantage and obviate many inconveniences, *from its enabling us, singly, to defer indefinitely the revision of the penal code.*

Of what use, also, are all those documents that are now delivered to the jury? What are they to do with them? Have they not heard the evidence, the reading of the procès-ver-

baux, and whatever the prisoner may have thought necessary for his defence? What more do they want? Either they are convinced, or they are not.

I will even go farther, and assert that, in the present state of things, there are but very few cases in which they can really have occasion to deliberate. That they should do so in England is sufficiently intelligible, since by law they are compelled to be unanimous. It is here evident that nothing but a discussion of the charges and of the grounds of defence, can, in the event of a difference of opinion, bring the whole jury to think alike. It is however very seldom that they deliberate, and only in capital cases. But in France, where unanimity is not compulsory, what necessity is there for a solemn discussion in each case? What end can it answer to hear each juror detail his opinion at full length? On the contrary, may it not sometimes be feared lest they should yield to the ascendancy of one of their colleagues, and abandon an opinion formed duly from the natural impressions received during the trial, to adopt that suggested by a skilful and persuasive man? Not that I would, in the slightest degree, deprive them of all deliberative power, since there are no other means of convincing a juror whose opinion may re-

pose on an error of fact: but I could wish it were not obligatory on them; and that in all cases they might be authorized to collect round their foreman to form their verdict, without being compelled, as they are now, to withdraw to their room to frame it.

Here would be the place to examine the great question of the unanimity of the jurors, a unanimity considered by the English as constituting the entire essence of the trial by jury, so that their most learned lawyers attribute to it alone all the advantages of this mode of trial: but the purport of this chapter does not admit the discussion of so weighty a subject.

It will be sufficient to mention that this unanimity was ordered by a law in 1798, and that it has continued to be required down to the promulgation of the existing code, that is, during the space of nearly twelve years, with this modification, however, that if, after a deliberation of four-and-twenty hours, the jury are not agreed, their verdict should in that case be returned by an absolute majority.

If we may credit a statement which has been made of all the verdicts during that period throughout France, it would appear they were all unanimous, with the exception of about forty, yearly; and that in Paris, particularly, out of a thousand and eight hundred

cases tried by the criminal tribunal during the space of four years and a half, there were but twenty-one in which the jury availed themselves of the liberty of deciding only by a simple majority.

The partizans of the unanimity argue from these data, and produce them as grounds for presuming that with more firmness and perseverance, it might have been easy to introduce among us, and to infuse into our system the necessity of this unanimity, so satisfactory on the side of justice, if not altogether indispensable to it; and to attain this end, they maintain that it would have been sufficient to deprive weak and pusillanimous jurors of that miserable alternative of the four-and-twenty hours, which offered a refuge to irresolution, and procured the means of escaping the responsibility of a verdict dictated by conscience.

The principal arguments opposed to this unanimity are that, in the event of disagreement among the jurors, the unanimity to which they ultimately come, is never more than apparent, and that in fact it is but the forced submission of the smaller part to the greater; that on all occasions of a verdict against the prisoner, either by a simple majority or one of two thirds, the public ought to be satisfied, and should consider as certain that the re-

maining third are in their hearts of the opinion of the majority, and that if they refuse to agree with the rest, the reason is that some are prevented by a feeling of weakness, and the others are men of a stubborn and obstinate disposition, who have laid down for their guidance the anti-social law of never pronouncing a condemnation, however convinced they may be of the culprit's guilt.

They assert, finally, that the system of unanimity produces no other effect than establishing a contest between the strong and the weak, in which victory must always rest with him whose mind and body can hold out the longest.

To these objections, the partizans of unanimity reply: First, That it is wrong to assert that, by their system, the union of the minority with the majority is merely apparent; since whatever condescension may be supposed in the former, we can never so far think that, with a strong and deep conviction of the prisoner's innocence, they could ever be tired into a surrender to the wish of the majority; and that their compliance with this wish proves at least that they had an inward persuasion of the prisoner's guilt, although they might have wished for more positive proofs against him during his trial.

Secondly, That if the public ought to consider as certain that the majority of two thirds really carries with it the assurance of unanimity, unless in cases where some of the jurors are determined, as it were, never to pronounce any condemnation, this becomes an additional motive to exact a public declaration of such unanimity; on one side, to force the weak from their last intrenchment, to cut off their shameful retreat, and compel them to march with the others to the assistance of society; and on the other, to break those refractory and systematic spirits who would be wiser than the law.

Thirdly, That we must not suppose that the bold and firm will always be on the side of error or bad faith; but will frequently be found in the cause of justice, and aid it by their zeal and courage: and that, lastly, if it be not mathematically impossible for a pertinacious and obstinate man to force the eleven jurors decided on condemnation, to abandon, by lassitude, their own opinion and adopt his, yet this is a less inconvenience than the one resulting from the existing system, by which we see a prisoner condemned by a majority of eight out of twelve, when the four others are perfectly convinced of his innocence, and may openly proclaim their opinion in the highways.

Such are the most usual arguments for and

against the system of unanimity: those which tend to procure its rejection are founded, as we see, only on a cowardly complaisance towards weakness and obstinacy; the others, on the other hand, are the result of a strong, manly, and generous theory, and conformable with the principles of a constitutional government: but why am I obliged to confess that our minds, as yet, are not sufficiently robust to bear its application, and that it would be inevitably followed by the most deplorable effects?

In our actual system, by which condemnation may be pronounced by a majority of eight to four, justice may still have some hope of triumphing, inasmuch as this system offers to such jurors as shall have decided for conviction, a retreat impenetrable to the investigations of those who might wish to ascertain what opinion they have given. How, indeed, can it be actually known by what majority a verdict has been returned, and who among the jury have voted for or against the prisoner? But by the system of unanimity, in which the votes of all are of course manifest, how many are there who would rather not have the remainder of their days disturbed by the apprehension of a possible revenge? We may summon all our mental powers, and boldly devote ourselves to every sort of hatred and danger

rather than subscribe the condemnation of the innocent: but are we equally scrupulous in the case of acquitting the guilty; and has the injury thus done to society ever caused much remorse?

I think then it may be affirmed that, in our present state of manners, and with the indifference we still bring to the exercise of our civil duties, it is altogether impossible, with the system of unanimity, to procure the punishment of a man guilty of a political crime committed in the interest of a powerful party.

If however this system were to prevail over the consequences which I think myself justified in apprehending, we ought in that case to establish a plain and vigorous unanimity, freed from all those means of evasion that are merely the timid compromises with weakness. We require to be taught our civic duties; the laws should compel us to learn them; we should be imbued with that civil courage in which we are deficient; and we should be trained to responsibility, the only method of connecting the same opinions in one common bond, of giving them consistency, of exciting defenders in their favour, and of causing them to be respected.

Let us now pass to the manner in which the points of a case are presented to the jury.

By the code, the question resulting from the

act of accusation or indictment is the only one that should be submitted to their deliberation. Reason, indeed, pointed out that a prisoner could only be tried for the fact indicated in that act, without which the procedure relative to his being brought to trial would become useless. But when circumstances, unknown during the preparatory stage, came to modify the nature of the offence, are we to deem ourselves obliged, strictly, to present to the jury the question of the act of accusation, which would thus remain without an object? The code had not foreseen this difficulty.

For instance, a man is seen descending from the window of a room in which a robbery has been committed: the articles stolen are afterwards found in his possession: he is presented to the jury as guilty of robbery with escalade.

At the trial, the case is entirely altered; the witnesses, who at the hearing and examination had positively deposed to the prisoner being the person whom they saw descending from the window, hesitate in their testimony; but the circumstance of the property being found upon him remains in full force: he is unable to explain in what way it came into his possession.

In this situation, we may conceive it possible for the jury to have some hesitation on the

principal charge, this hesitation arising from a doubt of the prisoner being indeed *guilty* of the robbery; but they can have none on the collateral fact, of his being at least an *accessary* by concealing the articles stolen.

The indictment, or act of accusation, however, makes mention of the *robbery* only, and is silent on the question of being *accessary*. What is to be done? Must we suffer the prisoner to be acquitted of the robbery, and remand him to undergo a fresh examination and committal, as an *accessary*, when it is plain that this committal must depend upon the same evidence as the former?

The inconvenience flowing from such a system may be at once perceived: business impeded, crowded gaols, vast expenses incurred by the state for nothing, prisoners subjected to three or four successive arraignments, and growing grey in confinement, without the power of obtaining a definitive trial. Such a state of things was intolerable in practice; nor does it indeed exist, provision having been made against it, as we are about to explain.

The courts, finding in the code of criminal process, no means of obviating the abuse just specified, and feeling the urgent necessity of so doing, have fastened on article 338, by which a president is allowed, when there re-

sult from investigation during the trial one or more aggravating circumstances, to present to the jury a fresh question relative to them. From this, the courts have drawn the inference that the president was authorized to present to the jury all the points collateral to those of the act of accusation.

Assuredly, the framer of the law was far from suspecting that this article would ever receive such an extension. He had only adopted it to furnish the means of perfecting the accusation, when it came to be aggravated by fresh depositions, proving a circumstance which was unknown at the examination, such as the being an accessory, escalade, or forcible entry; but he by no means contemplated establishing the right of presenting collateral questions. Consequently, when the first complainants against collateral questions presented by the presidents of the courts of assize came before the court of cassation, this court was at first extremely surprized at the strange construction put upon article 338; but it was soon convinced of the impossibility, in practice, of foregoing a legal interpretation by which courts of assize acquired the power of presenting questions collateral with those of the accusation; and that it was necessary, since the above latitude was not laid down in the code,

to supply it by giving to one of its articles a construction so urgently required.

But the wording of this article soon gave rise to another abuse, of which we daily experience the inconveniences. By its tenor, the president alone is to present the aggravating circumstance; and in like manner, according to the allowed construction, it is still he who is authorized to present the collateral questions. Hence it follows, that, in a great number of cases, a prisoner's fate is in the hands of the president.

An intimate acquaintance with the action of the jury system is required to form an idea of the influence given to a president by this power of presenting the collateral question. Frequently by neglecting to do it, and by laying before the jury only the main point of the charge, he is almost sure of procuring the prisoner's acquittal: this happens whenever the proofs of the offence are weakened at the trial by the depositions of the witnesses, and when these depositions, become equivocal as to the main fact of the accusation, refer only to one collateral to it. The jury, in this case, being questioned only as to that charge in the indictment that is doubtful, and not on the collateral one, which is proved, are obliged to answer by a negative. By adducing, on the other hand, the collateral question, the president may

often ward from the prisoner the conviction he would incur on the principal charge, which happens whenever the fact of the accusation is fully proved, but the penalty attached is very severe; and when the fact presented in the collateral question is likewise proved, but is visited by the law less rigorously: in such cases the jury rarely fail, from a natural feeling of indulgence, to find only the existence of the minor charge, and to acquit the prisoner on the principal one: so that the nature of the punishment to be inflicted on the prisoner, and often his acquittal even, may depend on the president's disposition to adduce, or not, the collateral question. Thus, not to depart from our previous supposition, we see that, in this particular case, the president would be nearly at liberty to procure the prisoner's acquittal or conviction, according as he may merely present the question of the act of accusation in which he is declared the *principal in a robbery*, or else present the collateral one by which he is accused as the *concealer of the property stolen*. All who have had occasion to frequent the courts of assize have a thousand times witnessed the above transactions, and they will feel the necessity of no longer leaving so extensive a power with the president.

It follows then from all these explanations

that, besides the principal question, it is often indispensable to present to the jury a collateral one, and still more all the questions flowing from circumstances which the law has considered as aggravating. Will it then appear surprizing that they should be occasionally plunged into a labyrinth of perplexity, especially when we reflect that they are instructed that the punishment will be irrevocably measured by their affirmative declarations; and consequently that they will endeavour so to combine their answers as to draw on the culprit a chastisement not more rigorous than he really deserves?

What a wide difference between all these difficulties and the *guilty* or *not guilty* of the English jury, which is always returned after a deliberation of two or three minutes! Is it impossible then to bring back our's to the same simplicity?

The first step to effect this will have been already taken when the judges shall be allowed, as I have previously proposed, the power of mitigating the punishment; because then the jury will no longer have cause for recurring to uncertain calculations; and may confidently rely on the equity of the judges as to the degree of chastisement to be inflicted on the culprit.

Henceforth our duty would be to present to

the jury one comprehensive question, as to an English jury; and to aim at so framing it that they may answer by a single word, *yes* or *no*, making that embrace at once all the points of the case, that is, the principal and collateral question, as well as all the aggravating circumstances. With them should be left, as in England, the power of dividing the question.

The following is the way in which I would propose to word it: *Is the prisoner principal or accessory in a robbery, or an attempt at aggravated robbery?*

This word *aggravated* would contain within it all the circumstances considered by the law as aggravating; but in the case where the circumstance would incur by itself a punishment of a particular nature, as in fraud or forgery, then such circumstance would be enounced in precise terms, and the question would be conceived as follows:

Is the prisoner principal or accessory in a robbery or of an attempt at robbery by the aid of fraud?

It would be the president's duty afterwards to explain to the jury what is meant in law by *accessary, attempt, fraud, &c.*

The jury would therefore have only to answer the question in one of these two manners: *Yes, the prisoner is guilty; or else, No, the*

prisoner is not guilty. Where they should consider the robbery proved, but unaccompanied by any aggravating circumstance, they would answer: *Yes, the prisoner is guilty of a robbery not aggravated.*

The trial would then be reduced to this: the clerk would merely inform the jury of the crime charged against the prisoner; the king's advocate would briefly detail the circumstances of the case, which would be an advantageous substitute for the reading of the act of accusation or indictment, on most occasions unintelligible to the jury; he would then examine successively all the witnesses for the prosecution; the prisoner's counsel, in his turn, would question the witnesses for the defendant; and all the witnesses would be cross-examined by the counsel on both sides; the latter should be expressly forbidden to draw any inferences before the jury from the evidence, either for or against the prisoner. This business would be left to the president in his recapitulation, which should immediately follow the examination of the last witness. The jury would afterwards form their opinion by gathering round their foreman, unless they expressly requested to withdraw to their room to deliberate. Their verdict should be returned by a majority of eight to four.

It remains now only to provide for the case where the difficulty consists not merely in the question of fact, but also in that of law, that is, in knowing whether the charge constitutes a crime punishable in law. Such a case frequently occurs with respect to aggravating circumstances: and occasionally, too, and with a great deal more importance, in some instances of fraud, where the prisoner admits the charge, but maintains, and not without plausibility, that it is a crime comprised in none of the cases provided for by the code. This happens when an individual is accused of having affixed to a note an imaginary signature, and in tendering it as the real signature of a person actually existing; or when he is accused of having entered into an obligation before a notary, under a false name, by saying he was unable to write. Such questions are at present agitated before the jury, between the advocate-general and the prisoner's counsel; but were all arguments suppressed, as I have proposed, the jury would not only feel it impossible to resolve all the difficulties just mentioned, but would not even be aware of their existence. On the other hand, were the counsel allowed to argue the point of law before the jury, it is plain that, under this pretext, they would in all cases seize the oppor-

tunity of arguing the fact: and thus all the advantages of the new mode of procedure which I have suggested would vanish. A remedy then must be sought for this inconvenience, and this I think may be found in the practice adopted in England on such occasions.

The jury, as we have seen, have also to decide on the question of law, but they are not absolutely obliged to do this, as in France. If, after the brief observations addressed on this subject to the judge by the prisoner's counsel, or after the explanations which the judge may have given in his recapitulation, the point of law appears to them of easy solution, they return a *general verdict*, which at once includes both fact and law; if, on the other hand, they conceive themselves incompetent to decide, they merely return a *special verdict*, in the form described in page 100, that is, declare the prisoner guilty or not guilty, according as the charge may or may not appear to the judge a crime in law.

Can we not adopt nearly the same process? and, to spare our juries the trouble of drawing up this special verdict, a task always very difficult, may not all their verdicts be considered *special*, that is, returned solely in the supposition that the court will decide whether the fact imputed to the prisoner constitutes

the crime foreseen by law; and consequently the prisoner's counsel, and the attorney-general be allowed to argue the point of law before the court?

A twofold advantage would result from such a system: 1st, there would be no further apprehension of the discussion of the fact being mixed up with the point of law; and 2dly, none but the most important legal questions would be agitated, and on which there would be a regular series of adjudged cases, which would supply, on all points, the imperfections or omissions of the code. It is understood that, in no case, can there be a question of submitting to the decision of the courts those questions of law which, from peculiar circumstances, have been expressly reserved for the decision of juries, such as ascertaining if any particular work ought or ought not to be considered libellous. Such questions will continue to be argued before them between the prisoner's counsel and the attorney-general.

This way of deciding questions of law may in the present day appear incompatible with the existence of the Chamber of Accusation. There would indeed be something contrary to the hierarchy and harmony of the powers, to try afresh by a court of assize composed of five counsellors, or more commonly of one

counsellor and four judges of first instance, a question of law, which shall have been already decided by the chamber of accusation of the royal court, composed invariably of five counsellors. But let it be remembered that I merely propose this mode of proceeding for a system in which the jury of accusation (or grand jury) should be re-established, and in which consequently there would appear to be nothing incongruous, in submitting to the revision of the judges a question of law which may have been decided by persons not trained to the study of criminal jurisprudence.

To finish all that concerns the courts of assize, I will add further, that I see no utility in their continuing composed of five judges, as they now are. The president (or chief justice) appears to me sufficient, as in England. The judges furnished as his assistants, doubtless for forensic dignity, having no sort of duty to perform, are at a loss how to fill up their time, and seem overburthened with its weight. They read, yawn, twist about on their seats, and, in such a state of impatience and lassitude, are ill adapted to fulfil the object proposed in their co-operation. Nor do I think that the power of moderating the punishment, to be granted to the courts of assize, furnishes any particular reason for preserving them in their present

state ; on the contrary, I am of opinion that the responsibility which would weigh on the president, were he single, would offer a more solid assurance of wisdom and moderation in the exercise of the new power to be confided to him, than that resulting from the union of the four judges to be continued as his adjuncts.

But for the future it would be requisite to bestow the most scrupulous attention in the choice of presidents ; and no longer to confide indiscriminately to all the members of the royal courts a duty which demands ready conception, firmness of character, and a facility of elocution, qualities rarely found united. From each court ought to be selected a certain number of magistrates who should be specially employed in presiding in the assize courts; within their jurisdiction ; or a particular body of magistrates should be set apart, consisting of about forty members, charged with presiding in all the assize courts of the kingdom.

A few words now on the composition of the jury.

What is the trial by jury ?—the trial by the country. The English term the jurors *the country of the prisoner : which country you are.*

Now, in what kind of jurors can a prisoner see the representatives of his country ? This

can only be in a determinate number of his countrymen selected *indifferently*, as Blackstone says, from those declared by law capable of exercising the functions of jurors. If therefore the selection of jurors summoned to the service of the assizes is left to the discretion of any authority whatsoever, whether administrative or judicial; or if this authority should possess indirect means of influencing it, either by eliminations or reductions, the prisoner can no longer see *his country* in them, that is, the chance assemblage of all the opinions prevailing in it. He sees in them none but judges placed over him by a man in the interest of his own power, his own political opinion, or his own private passions. It were better to have irremovable judges.

These principles strike me as so self-evident, that it seems impossible to depart from them without impairing the essential character of the institution of the trial by jury; and if the government still finds difficulty in adopting them, it is because its reason is blinded by the fear of losing one of the instruments which it thinks the most useful for the preservation of its authority. Let it cast away all apprehension: it will be neither less powerful nor respected, for freely renouncing every kind of influence over the administration of criminal justice.

If then it be indispensable that the persons who make a part of the general jury list of their department should enter only by ballot on the list of sessions of the assize courts, and should all be put down, each in turn, it is likewise evident that the general lists should be so made out that all, or at least the greater majority of those, impanelled, be capable of comprehending the importance and nature of the duties confided to them.

But how ascertain the capacity of those who are to be inserted in the general list? Whom are we to make umpires of the knowledge and probity of each individual, who must moreover possess the other required qualifications? Are they to be prefects, counsellors of the prefecture, members of the electoral college, magistrates? I still see in these various public officers none but men more or less dependent on government, and in whose eyes the most convincing mark of intelligence would always be a participation in their own political opinion.

I should prefer then seeking my presumptions of capacity in the source to which we apply in the case of determining what persons are fit to be deputies or electors, namely, in property, because it is this which presents the greater probability of education, and conse-

quently of knowledge and integrity. But I would take property as my criterion, once only, and for want of a better guide, and it would be my aim, for the future, to find one less hazardous.

I should fix then the number of jurors necessary for each department according to its population and the number of sessions commonly held within it. This number would be from six hundred to three thousand six hundred.

I would afterwards distribute the number of jurors determined for each department among all its several districts, according to their respective wealth and population; and to make up the number, I would summon, for the first time, such as paid the largest amount of rates in those districts. The district lists being thus formed, my plan would be that, for the future, the nomination to all places becoming vacant should belong to the jurors themselves of those districts, who should select, to supply them, such as they might deem the fittest, without demanding any specific condition of eligibility; in order that every one who was capable might be named, in whatever station fortune might have placed him. It appears to me that in this manner we should make sure of having none but jurors on whose integrity, knowledge,

and above all, on whose independence, there could not arise the remotest doubt.

If any inconvenience should eventually be experienced, by granting to the jurors themselves the right of nominating to the three or four places which might fall vacant, yearly, in their number; and there should exist a persevering obstinacy in thinking the concession of this right calculated to make the jury of each department a species of aristocratic corporation liable to prove accessible to private prejudice, the office might be conferred on the electors of each district, who might be assembled for this purpose on a fixed day in the year. If there be really no other intention but the exclusion from the jury, of those incapable of performing its duties, it must be allowed that the electors of each district, by their knowledge of the men with whom they are in habitual intercourse, are at least as well adapted as the prefects to select jurors of probity and intelligence, and we should attain the end desired without the interference of authority, an interference to be avoided with the utmost care in an institution having for its chief object the repression of an undue exercise of power.

Whether this or any other means be adopted of making up the general lists, let us nevertheless examine in what way we should take from

them the names of the jurors who are to compose the pannel for the sessions, and likewise in what manner the names of the jury of trial are to be obtained from the latter.

Let us not forget that here lies the important point, on which turns the whole independence of criminal justice; for in whatever way the general lists be formed, we cannot help seeing that, if we give the prefects or any other functionary the right of making up the lists for the sessions, they would find in the general lists as many as they require to serve their passions or espouse their resentment.

It is to avoid this danger that I have said we ought to have recourse to ballot. But what measures shall we adopt to collect its decrees? Who will be found the incorrupt ministers of that easy divinity? Who is ignorant of the impudence with which its oracles have, to the present day, been dictated to it?

Let us seek then a mode of drawing that shall be secure from all corrupt interference of the public officer who may have to perform this duty.

I would propose the following:

There should be a book in which the names of all the jurors of the department should be written indifferently, or in alphabetical order; this book should consist of as many

pages as there are jurors required for the service of each session, each page should contain the same number of names, with the exception of the last, which should contain, in addition, the surplus names remaining over after the division of the general number of the jurors of the department by the number of pages of which the book is to be composed. The names of all the jurors are to be numbered in the same manner in each page, from number *one* down to the last number of the page.

This book to be printed and sent to each juror.

The drawing should take place at the public audience of the court of first instance, after having been announced a fortnight previously by public posting-bills. It should be made by the president of this court, in presence of the prefect, and of all such jurors as chose to be present; and should take place in the manner following.

An urn should be placed openly on the president's table, containing as many numbers as there are names in each page of the jury-book; the president should draw one of these numbers, and the name of the juror corresponding in the first page with this number, should be the first juror for the session. The number to be afterwards replaced in the urn, and the

drawing proceed, in the same manner, of the second, third, and successively of all the pages of the jury-book, with the exception of the last, for which a distinct drawing should be made, adding in the urn the amount of numbers equal to the number of names of this page. As a further precaution, it might be ordered, that the president, before opening the number drawn from the urn, should request some one present among the spectators and unconnected with the judicial order, to tell him the page to which the drawn ticket referred.

Let us take an example to show the simplicity of this mode of drawing, and suppose eight hundred and seven jurors in the department.

The jury-book should contain thirty-six pages, (thirty-six being the number of jurors required, according to the regulation of the code, for the service of each session,) and each of its pages twenty-two names, with the exception of the last, on which should be put down the fifteen names remaining over after the division of the general number of the jurors of the department by thirty-six; which would increase to thirty-seven the particular number of jurors of that page.

All the names of the jurors should be numbered on each page, from one to twenty-two.

The urn would therefore contain twenty-

two numbers. The president would draw one; and before opening it, he would request one of the spectators to fix upon a page of the jury-book, with the exception of the last. Page seven is selected; the president opens the number, and finds nineteen: well then, the nineteenth juror of the seventh page is the first juror of the session. The president then restores the number into the urn, shakes up the tickets, and draws a second: another page is fixed on, and the juror corresponding in this page with the number drawn is the second juror of the session, and so on for the first thirty-five pages. With respect to the last, there should be added in the urn fifteen numbers, from twenty-two to thirty-seven, in order to include the number of jurors contained in this page; and out of these thirty-seven numbers, the president, or one of the by-standers, (as a set-off for being confined to this page without a choice, as in the preceding instances,) should draw a number indicating the juror in this last page who should complete the list for the session.

I am much mistaken if this mode of drawing would be susceptible of any kind of improvement. It would also afford a ready check against a juror's being re-summoned before his turn of duty came round; for, after each drawing, care would be taken to make a memoran-

dum by the side of the juror's name, on the page where he was entered, of the year in which he served, so that if his name should happen to be pitched on in a subsequent drawing, before the lapse of years prescribed by law, it would merely be necessary to draw another number for the page indicated.

As to the drawing of the jury of trial, subject at present to so many abuses, from the little scruple of some presidents of assizes in arranging the names of the jurymen in the urn, that the best informed and most experienced may always come up first, it might be arranged, to prevent such contrivances, whether innocent or not, that the president, for the future, should draw only the name of the first juryman, by whom should be drawn the names of his eleven colleagues.

Provision should also be made in case the number of jurors declared necessary for drawing the jury of trial should be deficient. Thirty is the amount fixed at present, and the statute prescribes that in case a less number should come forward at the calling over the names, the deficiency is to be supplied by a fresh drawing made by the president, out of such inhabitants of the commune where the court of assize is sitting, whose names are registered in the general jury list. Were this mode to be strictly followed, the first day of

the session would scarcely be sufficient to find substitutes for such as had made default: for the majority of those on whom the chance fell, might not be in the town, or at least at home, when the messenger came to announce their being called on. Such likewise (and unhappily there are too many) as might have a particular repugnance against duties of this nature, would contrive to secrete or absent themselves on the day for opening the assize court, and the whole morning might be spent in drawings and re-drawings, and in running from house to house to find a juror. Necessity has therefore given rise to a miserable expedient. An understanding is entered into beforehand with some inhabitants less scrupulous than others, with whom an agreement is made that their names shall be drawn if any further ballot happens to be requisite. They come forward, in consequence, in court, on the day the assize is opened, with the other jurors, to replace the defaulters. But it must not be imagined that such a favour is granted gratuitously; they, in turn, stipulate, that they shall be rejected by the public officer whenever they happen to be drawn, or, in other words, be dispensed from every duty but that of appearing at the calling over of the first jury.

Such are the consequences inevitably resulting from laws too absolute, which never allow

the most trifling matter to be left to the discretion of any one. It is no doubt right that all the jurors summoned should be present, or that, in the event of absence, a sufficient number should still remain to enable the attorney-general and the accused to make their challenges. But where is the absolute necessity for being tied down to this number, or for not proceeding to the ballot with less, when the prisoner and attorney-general give their consent?

These embarrassments might be rendered still less frequent, were a greater difference established between the number of the jury summoned, and that necessary for the ballot. The number of six jurors, out of thirty-six, which the law has, as it were, granted for all causes of absence that may prevent the jurors from arriving at their post, is insufficient; it should have been fixed at twelve or fifteen in forty-eight: in this case the drawing of the jury of trial would have been but rarely impeded.

Finally, if the number of jurors considered indispensable to commence business were defective, and the prisoner or attorney-general demanded its completion, instead of making a fresh drawing, which is always illusory, among all the inhabitants of the place where the court of assize is sitting, entered on the general jury list of the department, the readier way would

be to take such as might be in court, or in the neighbourhood. It is thus that the English proceed in like case, by means of their *tales*.

Why, too, that obligation for drawing a jury for each cause? What is to prevent one general arraignment, as in England, of all the prisoners whom it is presumed possible to try in the course of a morning; and drawing for the whole, and in their presence, twelve unexceptionable jurors? These twelve should, like the judges, go through the morning's business, and two or three supplementary jurors might be in readiness to supply such as might be fatigued. Much valuable time, now passed in placings and displacings, would thus be saved. These remarks may appear somewhat minute, but they are of great importance in practice. The institution of the trial by jury depends more than is supposed on their application, and on the rapidity given to the judicial process.

There remain many other very important observations to make on our code of criminal procedure, which the limits of this chapter prevent me from offering. I have merely pointed out the most urgent, and contented myself with showing in what manner we might adopt some forms of the English process that appear more expeditious and more in harmony, than our actual institutions, with the daily increasing

mildness of our manners. The greatest fault of our criminal process consists in the numberless difficulties with which it is accompanied : the languor resulting from the slowness of its progress operates both on judge and jury, and excites in the latter an invincible abhorrence of their duty. Add to this, the inconveniences of long absence, the expenses of their stay, the want of employment for their evenings in a strange town, and the alarm caused in their consciences ; and all astonishment will cease at their disinclination to arrive at their post.

But abandon this cumbersome and fatiguing system ; curtail and simplify the process ; let the conviction of a jury be no longer shaken by artful speeches ; let no positive law, by its severity, and inflexibility, be an obstacle to a free delivery of their verdict ; let case after case come on in rapid succession ; abridge the session to three or four days ; and we shall see the French resume for the trial by jury the enthusiasm displayed for it in the early days of its institution ; they would regard it as one of their proudest privileges, and perform its duties with the same zeal, the same courage, and the same independence as their neighbours.

THE END.

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